Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THOMAS FRANCIS GEPFRICH, Petitioner,

v.

MARJORIE LOIS GEPFRICH; JAMES FOX MILLER and MILLER & SCHWARTZ, P.A., Respondents

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Florida, annuities are exempt from creditors' claims and an insolvent debtor may convert nonexempt assets into an exempt property anytime before a judicial lien has attached - regardless of actual intent; Florida and the United States Congress [in the legislative history to 11 U.S.C. §522(b)] deem such conversions non-fraudulent as to creditors. The questions presented are:

1. Does 11 U.S.C. §727(a)(2)(A), which denies discharge for a debtor's fraudulent transfer of property before bankruptcy, require a bankruptcy court to apply the state law of fraudulent transfers - not federal decisional law - to a debtor's conversion of nonexempt cash into an exempt annuity moments before filing bankruptcy and thus, preclude denial of discharge for an asset conversion deemed non-fraudulent under state law?

2. In bankruptcy appeals, are the district court and court of appeals bound,

under the clearly erroneous rule, by a bankruptcy court's finding of fact that the debtor converted nonexempt cash into an exempt annuity with intent to defraud his former wife and her attorneys when under state law such conversion is deemed non-fraudulent?

3. If a debtor buys an exempt annuity moments before bankruptcy with an oral binder for annuity coverage, is the purchase valid against the trustee where (a) payment is made by cashier's check delivered before bankruptcy but (b) the contract is issued after bankruptcy?

Petitioner received for the sale of a business interest several years before bankruptcy cash, a five year employment contract and the right to borrow $3,080 monthly (with interest bearing notes) against his 25% share of the buyer's future profits operating the business. In the six months after his June 13, 1989 bankruptcy he drew $25,000 but his employer had no profits - only a $1.7 million loss for 1989. The questions

presented are:

4. Was the debtor's right to borrow the $25,000 property of the debtor's bankruptcy estate under 11 U.S.C. §541(a)?

5. If so, does 11 U.S.C. §541(a)(6), which excludes from the bankruptcy estate an individual debtor's post-bankruptcy earnings, bar the trustee from obtaining a $25,000 money judgment from the debtor where his right to borrow the $25,000 was conditioned on his rendering post-petition personal services?

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

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---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Thomas Francis Gepfrich respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.-53) is unreported. The opinion of the district court (App.-44) is unreported. There are three July 6, 1990 opinions rendered by the bankruptcy court: its findings of fact and conclusions of law in Adv. Case No. 89-0433 (regarding denial of Petitioner's bankruptcy discharge) (App.-13) is reported at

118 B.R. 135. Its findings of fact and conclusions of law in Adv. Case No. 89-0465 (on invalidation of the annuity purchase as a post-petition transfer or fraudulent transfer) (App.-28) is unreported. Its memorandum decision sustaining objection and supplemental objection to exemptions (App.-5) is also unreported.

JURISDICTION

The court of appeals entered its judgment on October 19, 1993 (App.-53) and denied (App.-54) on November 30, 1993 a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The district court entered its judgment on August 20, 1992 (App.-44). The jurisdiction of the district court was invoked under 28 U.S.C. §158(a).

STATUTORY PROVISIONS INVOLVED

1. §222.11, Florida Statutes (Exemption of wages from garnishment) (App.-58)

2. §222.14, Florida Statutes (Exemption

of cash surrender value of life insurance policies and annuity contracts from legal process) (App.-58)

3. 11 U.S.C. §541 (Property of the estate) (App.-59)

4. 11 U.S.C. §548 (Fraudulent transfers and obligations) (App.-59)

5. 11 U.S.C. §549 (Postpetition transactions) (App.-60)

6. 11 U.S.C. §727 (Discharge) (App.-60)

STATEMENT

Petitioner, a Chapter 7 bankruptcy debtor, sued his ex-wife, Respondent Marjorie Lois Gepfrich and her attorneys, Respondents James Fox Miller and Miller & Schwartz, P.A., in an adversary suit to determine under 11 U.S.C. §523(a)(5)(B) that a $270,000 equitable distribution award to the ex-wife under a 1986 dissolution of marriage judgment was dischargeable and that some $59,000 in attorney's fees due her attorneys was likewise dischargeable. Respondents counterclaimed under 11 U.S.C. §727(a)(2)(A) for denial of discharge, alleging the Petitioner made a fraudulent transfer by purchasing a $49,000 annuity minutes before bankruptcy. Respondent Daniel Bakst, the bankruptcy trustee, filed a separate adversary suit against Petitioner to avoid the annuity purchase as a fraudulent transfer or, alternatively, as a post-petition transfer.

In a consolidated trial proceeding, the bankruptcy court denied Petitioner's

discharge, invalidated the annuity purchase, sustained all objections to his exemption claims and awarded the trustee, Respondent Bakst a $25,000 judgment against Petitioner. Petitioner appealed to the district court which affirmed (with an opinion) the bankruptcy court's ruling. Petitioner appealed to the court of appeals, which affirmed per curiam the district court's affirmance.

A. Denial of Discharge for Pre-Bankruptcy Planning (Asset Conversions on the Eve of Bankruptcy)

This case concerns a critical conflict in bankruptcy law - not previously addressed by the Supreme Court - between the power of bankruptcy courts to deny a debtor's discharge for fraudulent property transfers made in the year before bankruptcy and their duty to protect debtors' rights to enjoy state law-created privileges of exempting property from creditors' claims. Although the bankruptcy court has jurisdiction to decide the merits of an exemption claim, 28 U.S.C. §157(b)(2)(B),

the validity and scope of the exemption is controlled by application of state law. Holden v. Stratton, 198 U.S. 202, 213-14 (1905). Similarly, many federal courts have held that the question of whether a particular transfer of property by a debtor is fraudulent is determined by the law of the state where the transfer has occurred; this was so under the Bankruptcy Act[1] and remains the rule under the Bankruptcy Code.[2]

State exemptions vary widely from, e.g., the parsimonious allowances in the north-eastern states to the magnanimous allowances of states such as Texas and Florida.[3]

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[1] Engstrom v. Lowell, 281 Fed. 973 (1st Cir. 1922); Hale v. Hummel, 64 F.2d 210 (8th Cir. 1933)

[2] In re Universal Clearing House, Co., 60 B.R. 985 (Bankr. Utah 1986); In re Janis, 60 B.R. 349 (Bankr. S.D.Fla. 1986)

[3] Koger and Reynolds, Is Prefiling Engineering Prudent Planning or Section 727 Fraud? (Or, When Does a Pig Become a Hog?), 93 Comm. L.J. 465; Resnick, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L.Rev. 615 (1978).

The emerging development in bankruptcy practice that the instant case epitomizes is that in states with extremely liberal debtor's exemptions (such as Petitioner's state, Florida, where, e.g., Art. X, Sec. 4 of the Florida Constitution allows a debtor to own a 160 acre homestead and §222.14, Florida Statutes allows a debtor to own annuity contracts - both unlimited in dollar amount), some bankruptcy courts - like the court in this case - deny the debtor's discharge because the bankruptcy court concludes that the same conversion of nonexempt property to exempt that would be valid, i.e. not fraudulent as to creditors, under state law is accompanied by what the bankruptcy court labels "extrinsic fraud". [Even though the factual basis for the finding of "extrinsic fraud" would not render the same transaction voidable in state court by a judgment creditor, the debtor loses his discharge because the "clearly erroneous" rule renders the bankruptcy court's finding of "fact"

unassailable.]

B. Background; Origin of the Equitable Distribution (Property Settlement) Debt to Mrs. Gepfrich

Petitioner Thomas Gepfrich is a home builder whose June 13, 1989 voluntary Chapter 7 bankruptcy stems from a 1986 dissolution of his marriage to Respondent Marjorie Gepfrich ("Mrs. Gepfrich). The dissolution judgment awarded her periodic alimony and child support, divided the parties' properties and to make the division of marital assets equitable, awarded Mrs. Gepfrich an additional equitable distribution/lump sum property settlement award of $270,000, payable over 38 months. The judgment denied her request that these obligations be secured by a lien but allowed her to request such lien if Petitioner thereafter defaulted.

C. Background; Origin of Petitioner's $50,000 Certificate of Deposit ("the C.D.")

In September, 1987, Petitioner and Ron Blum sold their 100% stock interests in Heritage Quality Construction Co., Inc.

("Heritage") to Ambassador Real Estate Equities Corporation ("Ambassador"). Petitioner received $124,700.50; he and Blum also received five-year employment contracts and, additionally, each would receive 25% of Heritage's profits for five years. Each could draw $3,080.00 monthly (with interest-bearing notes) against his 25% share of profits; $50,000 of the cash Petitioner got at closing was pledged until September 3, 1989 in a certificate of deposit with Ambassador, the stock purchaser, to secure repayment of the draw promissory notes if the draws were not covered by the share of profits due Petitioner.

D. Bankruptcy Filing to Avoid Jailing For Failure to Pay Equitable Distribution liber Debt: the Decision to Buy the Exempt Annuity;

In March, 1989 Mrs. Gepfrich petitioned the circuit court to compel Petitioner to pay (as alimony) the $170,000 balance of the equitable distribution award, plus interest; she requested no lien on Petitioner's assets.

The circuit court granted her petition, directing Petitioner to pay the $170,000 by May 21, 1989. However, neither this order nor any other order ever impressed a lien on Petitioner's assets (including the $50,000 certificate of deposit ["the C.D."]) described above) to secure payment of the equitable distribution award or some $59,000 in attorney's fees due Respondents Miller and Miller & Schwartz, P.A.

When Petitioner failed to pay the $170,000 Mrs. Gepfrich scheduled a circuit court hearing on her contempt motion for 3:00 P.M., June 13, 1989. Fearing he might be jailed, Petitioner contacted bankruptcy counsel Samuel L. Heller, June 8, 1989. Heller told Petitioner the bankruptcy trustee would seize the $50,000 C.D. and suggested Petitioner try to get Ambassador's pledge lien released so that Petitioner could convert (before bankruptcy) the $50,000 C.D. into an annuity Petitioner could claim as exempt under §222.14, Florida Statutes (App.-58).

Heller then showed Petitioner the following statement from the legislative history to 11 U.S.C. §522:

> As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.

Petitioner relied on this congressional statement in deciding to purchase the annuity.

E. Florida's Liberality - Treating Insolvent Debtors' Asset Conversions to Exempt Property as Non-Fraudulent.

§222.14, Florida Statutes (App.-58) exempts annuity contracts without limit as to dollar amount. There is no Florida statute or appellate decision requiring that an annuity or homestead be purchased so many months before bankruptcy. The only limitations imposed by case law are that the asset has to be purchased prior to the point in time that a judicial lien has attached and the asset can

not be acquired with stolen funds[4].

Florida Supreme Court decisions even indicate that the insolvent debtor can deliberately and purposely convert business assets[5] into exempt property while a specific judgment creditor is in hot pursuit of the debtor and his assets and that the debtor's intention in placing the property into an exempt medium, and thus beyond the reach of his creditors, is, by its very nature, not a fraud upon creditors but rather, a legitimate exercise of the debtor's right to acquire and enjoy property exempt to him under the constitution and statutes of the state. Lee v. Bradley Fertilizer Co., 33 So. at 459. Accord, Heddon v. Jones, 154 So. 891 (Fla. 1934). See also, Spach v. Kleb, 112 So.2d 21 (3rd D.C.A. Fla. 1959).

The Florida courts even go so far as to

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[4] Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925)

[5] Lee v. Bradley Fertilizer Co., 14 Fla. 787, 33 So. 456 (1903).

uphold the right to acquire and own exempt property as paramount - even where there have been representations to a creditor that certain assets (later liquidated for the asset conversion) would be used for business purposes. Thus, in Lee, the partners of an insolvent partnership deeded partnership lands and chattels to themselves while judgments were being sought by partnership creditors (and later entered against them and the partnership); their homestead purchases were upheld as exempt from levy and sale. Similarly, in Spach, the debtors had operated a partnership and had specifically furnished financial statements to certain creditors representing that the partnership's real property was a part of partnership assets and would be responsible for the debts of the partnership. They then liquidated the realty and operated the business by leasing it to the partnership, using the proceeds from the sale of the partnership land to satisfy mortgage liens against the homesteads of the two

partners and their wives. Nine months after converting the partnership realty into the mortgage paydowns, they filed for bankruptcy.

The trustee sued in state court for an equitable lien against the homesteads equal to the amount of the proceeds derived from the partnership lands. On appeal, the third district court of appeal affirmed dismissal of the suit because the trustee's complaint failed to state a cause of action under Florida law. The court reiterated the Lee rule, stating 112 So.2d at 23:

> [A] party who acquires property with the intention that the law shall exempt it from his debts does not commit a fraud upon his creditors, for to do so would impute to the law an intention to work an injustice.

Accord, Beall v. Pinckney, 150 F.2d 467, 471 (5th Cir. 1945). ["The intention to do what the (Florida) Constitution not only permits but provides, is not an intention to hinder and defraud creditors ... (because) [n]othing has been taken from (the creditors) to which they were entitled...."]

In summary, there are three distinguishing characteristics about the Florida treatment of exemptions and a debtor's right to convert nonexempt assets into exempt property while a creditor is in hot pursuit. First, the exemption is unlimited as to dollar amount and there is no requirement that the exempt asset be acquired a certain minimum amount of time before bankruptcy.

Second, the only limitation is that the conversion from nonexempt to exempt must occur prior to the point in time that a judgment lien has attached to the asset in its nonexempt state. As the Florida Supreme Court stated in Lee v. Bradley Fertilizer Co., 33 So. at 459:

> We think that partners, acting in good faith, have a right to sever their joint interests in the firm property by contract of sale from one partner to the other, or by a division of the property between them, at any time before the firm creditors obtain a lien thereon...and that they may thereafter successfully claim it as exempt from execution, although at the time of the severance, the firm be insolvent.... The title to the property sought to be exempted in this case, though formerly vested in the copartners, was completely vested in each partner, respectively, in severalty, by the deeds of conveyance mutually executed between them; and this (conversion to exempt property) was effected before the acquisition by the complainant of any lien thereon by judgment or otherwise... (emphasis added).

The same principle, that conversion can occur anytime before a judgment or attachment lien is impressed on the nonexempt asset - is set forth in the controlling federal precedent in Florida, Beall v. Pinckney, 150 F.2d 467, 471 (5th Cir. 1945), wherein the court held that since the debtor's home purchase had been consummated "before any actual or constructive seizure by lien (of the home) to pay his debts", 150 F.2d 471, his right to claim the

home as exempt in his bankruptcy was upheld.

Third, the Florida courts have emphatically told creditors how to prevent the problem of extending credit and seeing the debtor then shield his assets from the reach of the creditor's judgment. In Heddon v. Jones, 154 So. 891 (Fla. 1934), the court stated, 154 So. at 892:

> Such contingencies as are involved in this case can be guarded against by (the creditor) either taking an express written lien on the unincumbered property at the time credit is extended, or by beginning a suit and levying an attachment on the land to impress on it an attachment lien ....

F. Purchase of the Annuity 37 Minutes Before Bankruptcy; The Oral Binder for Annuity Coverage; The Cashier's check

On the morning of June 13, 1989 Petitioner got Ambassador to release its pledge lien, Petitioner then receiving a $49,012.09 cashier's check (his half of the $100,000 C.D. less an early withdrawal penalty). The same morning he met insurance salesman Sam Williams (at Heller's office) whom he had recently contacted about the

annuity purchase. He told Williams that morning he had to get confirmation from Williams' insurance company [First Colony Life Insurance Company of Lynchburg, Virginia (hereinafter, "First Colony")] that the annuity purchase would be effective upon Petitioner's signing the application and paying the $49,012.09 purchase price by cashier's check that morning, i.e., before Petitioner would file his bankruptcy petition later that day.

Williams then phoned First Colony's Ft. Lauderdale general agent, Douglas Fuerst who immediately (that morning) called **First Colony's senior vice-president, Linda Mayhew, in Virginia who verbally approved Petitioner's request for immediate annuity coverage** (while Petitioner waited at Heller's office with agent Williams until Fuerst telephoned back that approval had been given).

Petitioner then endorsed his $49,012.09 cashier's check to First Colony and as he handed the signed application and endorsed

check to Williams the latter again assured Petitioner the annuity contract was in effect that morning as Williams would immediately drive the application and check to Fuerst's office in Ft. Lauderdale. Williams did so and at 1:50 P.M. that day (June 13th) Williams transmitted by facsimile a message to Heller and Petitioner (on Fuerst Agency letterhead) that: "Everything is done."

Petitioner signed his bankruptcy papers and his petition was then filed 37 minutes later at 2:27 P.M., June 13, 1989. On June 20, 1989 Petitioner received the original annuity contract from First Colony effective - per Linda Mayhew's verbal assurance - June 13, 1989.

G. Litigation Regarding the Annuity Purchase

Petitioner's adversary suit against his ex-wife sought a determination that the equitable distribution debt was a property settlement debt, and hence dischargeable, not being in the nature of alimony. 11 U.S.C. §523(a)(5)(B); other federal courts have so

ruled.[6] He also sought a determination that his $59,000 attorney's fee debt to Respondents Miller and Miller & Schwartz was dischargeable, as relating to the attorneys' prosecution of the ex-wife's dischargeable property settlement claim. The Respondents counterclaimed for denial of discharge alleging that the annuity purchase was a fraudulent transfer within the year preceding bankruptcy and the trustee filed a separate adversary complaint against Petitioner for denial of discharge, to void the annuity purchase as a fraudulent transfer and alternatively, to void the transfer as a post-petition transfer. [Mrs. Gepfrich also filed an objection to the Petitioner's claim in his bankruptcy schedules that the annuity was exempt.]

H. Petitioner's Conflicting Testimony: Significant or Not Significant?

At a consolidated trial on the foregoing

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[6] In re Kaufman, 115 B.R. 435 (Bankr.E.D.N.Y. 1990); In re Macys, 115 B.R. 883 (Bankr.E.D.Va. 1990).

claims and objections (and the Trustee's claim for recovery of $25,000 Petitioner took in post-petition draws against his anticipated share of profits - discussed **infra** on Page3 42-43), all of the facts described above were established without dispute. The only conflict in the evidence related to the **date** the Petitioner first learned he could get the $50,000 C.D. released from Ambassador's pledge lien. At trial, Petitioner and Ambassador's President, Steve Epple, both testified that on June 9, 1989 (the day after Petitioner met attorney Heller), Petitioner met with Epple and then requested (for the first time) that Ambassador release the pledge lien (which was then due to expire in eighty-six days, on September 3, 1989) so that Petitioner could buy an annuity with his $50,000 and then file his Chapter 7 bankruptcy. In an earlier summary judgment affidavit, however, Petitioner made a conflicting statement (as to the date he learned he could get the pledge lien released). He stated the following, in

Paragraph 7:

> I informed Mr. Heller, however, that - long before I even thought of filing a bankruptcy - Mr. Blum and I had already had informal discussions with represent-atives of Ambassador Real Estate Equities Corporation about the fact that Mr. Blum and I really would appreciate it if Ambassador would release the pledge lien earlier than September 3, 1989; and I also told Heller that Ambassador's repre-sentative, Steve Eppel, had already told Blum and myself in approximately May, 1989 that any time we wanted the pledge lien released Ambassador would release it gratuitously - without anything being paid to Ambassador, so that we (Blum and I) could get our $100,000 released whenever we wanted it. (emphasis added)

Even though this affidavit indicated the Petitioner knew in May, 1989 he could get the pledge released, the bankruptcy court interpreted this statement as indicating that a month earlier, in April, 1989, Petitioner knew he could get the pledge lien released. The bankruptcy judge had difficulty with this time gap of a month and resolved it by finding that even if Petitioner didn't know before June that he could get the pledge lien released earlier than the September 3, 1989

scheduled date for expiration of the pledge lien, Petitioner **believed**[7] he could get it released early!

In its findings of fact and conclusions of law (App.-28, 31-32), the bankruptcy court criticized Petitioner for his inconsistent

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[7] At the August, 6, 1990 hearing on Petitioner's motion to alter or amend the two adversary final judgments, the bankruptcy judge indicated admitted he was unable to determine whether Petitioner **knew** or **believed** anytime prior to the his June 9, 1989 meeting with Ambassador's Epple that he (Petitioner) could get the pledge lien released:

MR. HELLER: The point is, Your Honor indicates that he defrauded Mrs. Gepfrich. In order for him to have defrauded Mrs. Gepfrich he would have to have known by virtue of communications with Ambassador prior to June that he could get the monies. There is no ---

THE COURT: Well, that is what I believe he did; I believe that he knew prior and that he defrauded her.

MR. HELLER: That he knew that he would get the money before that date?

THE COURT: **I believe that he** had, at least **either knew it or believed it** - (emphasis added) (Tr. 8/06/90, P 16, L 16-25, P 17, L 1-3)

testimony - contrasting his summary judgment statement with testimony the debtor gave to the state court in the dissolution case a month earlier (April, 1989). The bankruptcy court does not refer to any statements the debtor made to anyone in **May**, 1989, but rather to his testimony before the state court in the dissolution proceeding in April, 1989. The debtor, however, was never asked in the following exchange anything concerning whether he had the **ability** to get the pledge lien released earlier than its September 3, 1989 expiration. The exchange indicates he was only asked **when** the $50,000 would be distributable to him (free of the pledge lien) under the parties' September 3, 1987 stock purchase agreement. His statements were correct - especially his statement that major losses Heritage was then experiencing in 1989 might mean he had failed to earn his draws (because, in fact, Heritage made no profit in 1989: **it lost $1,743,711**. Here, then is the testimony that - according to the bankruptcy

court - "mislead" Mrs. Gepfrich (who never testified she was mislead and who, upon learning about the $50,000 C.D. at this April 17, 1989 hearing, took no action whatever to have the circuit court impress it with a lien in her favor - even though that court's dissolution judgment had expressly told her she could come back and request a lien if Petitioner ever defaulted in paying his debts to her!) Here, then is the testimony that cost Petitioner his bankruptcy discharge:

[Cross examination by Val Osinski, Esq., counsel for Marjorie Lois Gepfrich]:

Q Sir, there's (a) $100,000 Certificate of Deposit at Ambassador Savings and Loan in your name and your partner's name, correct, sir?

A That is correct.

Q When does that come due?

A I believe it's September. I would say if you take the buy-sell agreements, I believe it's September.

Q. That's correct. It's two years after it

closed, $100,000 C.D.. Half of that is yours, right?

A That's correct. (Cir. Tr. 4/17/89, P 54, L 24)

* * *

Q And you got 50,000 coming from this C.D., right, in September?

A In theory, yes.

Q The reason you say in theory is what, sir? Why do you say in theory?

A Well, I had major losses between now and then. They don't have to release it.

Q In other words, they can hold back --

A Sure.

Q -- if you don't meet - if you lose money?

A Uh-huh, that's correct.

Q When is the last time Heritage Construction ever lost any money?

A It lost it last quarter. (Cir. Tr. 4/17/89, P 63, L 15-25; P 64, L 1-9)

I. Bankruptcy Court's Rulings on the Annuity Purchase

The bankruptcy court made separate findings of fact and conclusions of law in each of the two adversary suits. In the case involving the counterclaim for denial of discharge by Mrs. Gepfrich and her attorneys, the bankruptcy court concluded (App.-13, 20) because the local insurance agent didn't have authority to deposit Petitioner's cashier's check and had to ship the same with the application to the insurer in Virginia and the check didn't clear until several days after bankruptcy, the annuity purchase was a post-petition transfer voidable by the trustee under 11 U.S.C. §549. (App.-20, 25-26). The court made no mention of the evidence indicating an oral binder for annuity coverage had taken effect several hours before the bankruptcy was filed. [In making these findings the bankruptcy court ignored the fact that oral insurance binders are recognized in

Florida by decisions[8] holding that when a prospective insured pays the premium requested by the agent, completes the application on the form prescribed by the insurer and is assured by the agent that insurance coverage has then taken effect (as Petitioner was so assured herein), the insurer is bound as of that instant.]

The court also stated (App.-23):

> This Court follows those decisions which have denied a debtor's discharge which found extrinsic fraud such as where there was a diversion of business assets into exempt property or where borrowed monies are placed into exempt property. See In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Mehrer, 2 B.R. 309 (Bankr. WA 1980); In re Collins, 19 B.R. 874 (Bankr. M.D. Fla. 1982); In re Ford, 773 F.2d 52 882 (4th Cir. 1985); In re Smiley, 864 F.2d 562 (7th Cir. 1989). Here, after considering the amounts involved, the timing, the fact that the proceeds were derived from marital assets the wife had an interest in, the misleading impression given to the wife and the

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[8] Hughes v. Pierce, 141 So.2d 280, 282 (Fla. 1st D.C.A. 1961); Russell v. Eckert, 195 So.2d 617 (Fla. 2nd D.C.A. 1967); and Fidelity and Casualty Co. of New York v. Britt, 393 So.2d 41 (Fla. 3rd D.C.A. 1981)

> state court as to the avail-ability of the certificate of deposit and the insolvency of the Debtor clearly supports the conclusion that the Debtor's actions, in converting the certificate of deposit into the annuity, were done with the requisite fraudulent purpose to hinder, delay and defraud the wife and MILLER. For the Court to conclude otherwise would set the precedent to allow parties obligated under marital decrees to convert all of the marital properties into annuities or exempt property to avoid the obligations called for under such decrees.
>
> The Debtor argues that the prior ruling of In re Blum, 41 B.R. 816 (Bankr. S.D. Fla. 1984) should govern this case. In Blum the Court stated the mere act of converting property into exempt property, without more is not prohibited by the Bankruptcy Code. Here the facts and circumstances are clearly distinguishable from those presented in Blum.

Judgment was entered denying discharge (App.-12).

In the trustee's adversary suit to avoid the transfer, the court also rendered findings of fact and conclusions of law (App.-28), wherein the court added two other circumstances as the basis for the invalidation of the annuity purchase: The court's conclusion that the transfer did not

occur until the check was honored post-petition by the bank that issued the cashier's check (App.-35-36). However, in ruling that ownership of the money evidenced by the cashier's check did not pass until the check was cleared, the bankruptcy court made no mention of Florida decisions of the Fifth Circuit[9] and the Eleventh Circuit[10] holding that title to a cashier's check passes on delivery to the payee or endorsee since acceptance of a cashier's check occurs when the bank issues the same - not when the check is returned to the bank.

As an additional basis for its conclusion that this was not permissible pre-bankruptcy planning but was a fraudulent transfer, the court noted (App.-37) that:

> This transfer of non-exempt assets into an exempt annuity was a

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[9] State of Pa. v. Curtiss Nat. Bank of Miami Springs, Fla, 427 F.2d 395 (5th Cir. 1970)

[10] Nicholson v. First Investment Co., 705 F.2d 410 (11th Cir.)

> fraud with regard to the debtor's ex-wife and her attorneys who had been trying to reach this particular asset earlier. (emphasis added).

[Contrary, however, to this finding, the ex-wife never made any attempt to proceed against this asset or any particular asset; the only thing Respondents secured was an in personam order requiring the debtor to pay by May 21, 1989 the debt which the debtor regarded as a fully dischargeable property settlement debt.]

For these reasons, the bankruptcy court entered judgment invalidating the annuity purchase, both as a fraudulent transfer under 11 U.S.C. §548 or alternatively, as a post-petition transfer under 11 U.S.C. §549, and denied the debtor's discharge under 11 U.S.C. §727(a)(2)(A).

J. Litigation Regarding the $25,000 in Post-Petition Draws by Petitioner

In 1988 Petitioner's $3,080 monthly draws against his share of Heritage's profits were covered - his share of 1988 profits exceeded his $3,080 monthly draws and he duly reported his 1988 profit distribution as income on his

tax return. In 1989, however, Heritage lost $1,743,711 such that $25,000 he received post-bankruptcy (June 13-December 31, 1989) in monthly draws was not covered because there were no profits; he remained indebted (on promissory notes) to repay this post-petition debt of $25,000 to his employer.

Petitioner's right to receive annually 25% of profits was not unconditional. The 1987 stock purchase agreement provided that if Petitioner ever terminated his employment under the separate five-year employment contract (executed the same day as the stock purchase agreement) Ambassador had the right to terminate all further distributions of profit to Petitioner. Petitioner had claimed as exempt wages due himself as head of a family [under §222.11, Florida Statutes (App.-58)] his right to receive these post-petition draws. Mrs. Gepfrich objected to this exemption claim.

K. Bankruptcy Court's Rulings Regarding $25,000 in Post-Petition Draws

In its memorandum decision sustaining objection and supplemental objection to exemptions of July 6, 1990 (App.-5) the bankruptcy court overruled Petitioner's claim that his Contingent Purchase Price payments (his 25% share of profits - evidenced by the $3,080 monthly draws) were exempt wages under §222.11, Florida Statutes (App.-58), which exempts wages due the head of a family from garnishment or other legal process. The court stated (App.6-7):

> The evidence is undisputed from a review of the debtor's tax returns, that he receives two different forms of compensation from Ambassador. One form of compensation is treated clearly as wages, which constitutes compensation under the employment agreement. This is listed as wages on his tax returns. The other form of compensation is under the stock purchase agreement. This is treated by the debtor on his income tax returns as installment sale income. The debtor is bound by his tax returns and cannot now claim the stock purchase proceeds as wages. Therefore, the objection to this exemption is sustained.

By a separate turnover order (App.-7) the court ordered the Petitioner to turn over all

monies received under the stock purchase agreement since the date of bankruptcy. As Petitioner had used all of the $25,000 to pay Mrs. Gepfrich $5,000 monthly payments of alimony and child support and his living expenses he was unable to turn over the $25,000 to the trustee who then secured a $25,000 money judgment (App.-9) against Petitioner.

All of these various orders were appealed to the district court which affirmed them (App.-44) in August, 1992. The district court concluded that under 11 U.S.C. §727(a)(2) a Petitioner's right to convert non-exempt property into exempt property was "limited by the power of the bankruptcy court (under 11 U.S.C. §727(a)(2) to deny a discharge if there was extrinsic evidence of the Petitioner's intent to defraud creditors." (App.-48) The district court invoked the clearly erroneous rule (App.-48) and thus refused to upset the bankruptcy court's finding of fact Petitioner had made the conversion with intent to hinder,

delay or defraud Respondents.

Petitioner appealed to the court of appeals which affirmed per curiam (App.-53) the district court's affirmance order.

REASONS FOR GRANTING THE PETITION

There is something radically wrong with a bankruptcy case (such as the instant case) where the debtor confers with experienced bankruptcy counsel, reads the statement of Congressional intent that appends 11 U.S.C. §522 (indicating that conversions of nonexempt property into exempt property "before" bankruptcy are permitted) and then acquires an exempt asset with his cash not then under any judicial lien, only to learn months later in his bankruptcy that he has thereby forfeited his discharge! The problem stems from the fact that the Bankruptcy Code does not address this question and many bankruptcy judges are simply outraged at the unlimited nature of state laws preserving exemption privileges to

insolvent debtors.

There are six specific reasons why this court should grant certiorari and make a determination as to whether it will restore order to this chaotic landscape that now lies before both debtors contemplating bankruptcy and wishing to maximize their state law exemptions and their counsel, who must advise the unfortunate debtor in making decisions that can have critical and devastating consequences if the wrong path is chosen (or if his bankruptcy case ends up on the docket of a bankruptcy judge who does not look kindly upon asset conversions on the eve of bankruptcy):

I. The Decision of the Court of Appeals Conflicts with Prior Decisions of The Supreme Court

This court, on numerous occasions, has reiterated that the validity and scope of a debtor's exemptions are controlled by state law. Thus, in Holden v. Stratton, 198 U.S. 202, 25 S.Ct. 656, 49 L.Ed. 1018 (1905) Mr. Justice White stated, 25 S.Ct. 659:

> It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to the state exemption laws.
>
> From the organization of Federal courts under the judiciary act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the state.... The same rule has obtained under the bankruptcy acts, which have sometimes increased the exemptions... but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule, observed from the creation of our Federal system, should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction. (emphasis added)

Accord, Meyer v. United States, 375 U.S. 233, 84 S.Ct. 318, 11 L.Ed.2d 293 (1963); Hanover Nat. Bank v. Moyses, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113 (1902). There is no way that one can rationally reconcile the affirmances by the district court and court of appeals below of the bankruptcy court's rulings with the Supreme Court's holding that state exemption laws are to be given full

effect. How can the Congressional statement that a pre-bankruptcy asset conversion of a debtor's assets to exempt property mediums is not fraudulent have any meaning whatever if a bankruptcy court is allowed to engraft onto the whole scheme of state law asset conversion rights the traditional indicia or badges of fraud? The need for a resolution of this conflict is apparent.

II. The Decision of the Court of Appeals Conflicts on an Issue of State Law With Decisions Rendered by the Florida Supreme Court

When one compares the factual circumstances cited by the bankruptcy court in the instant case (the fact that the debtor was insolvent, that Respondents were in hot pursuit of the debtor in state court, and that although no **lien** had ever been impressed upon the debtor's assets, the debtor was still under some type of quasi-lien restriction because the circuit court had "entrusted the assets to the Petitioner to afford him maximum flexibility in discharging his obligations to

his ex-wife..." with the objective standards prescribed by Florida's Lee v. Bradley Fertilizer Co., 14 Fla. 787, 33 So. 456 (1903) and Heddon v. Jones, 154 So. 891 (Fla. 1934), it is apparent that the **effect** of the court of appeals' per curiam affirmance of the district court's opinion [and the district court's reliance on Norwest Bank Nebraska, N.A. v. Tveten., 848 F.2d 871 (8th Cir. 1988)] is that there is an irreconcilable conflict between the instant decision of the court of appeals and the latter two Florida decisions. Where such conflict exists, certiorari should be granted to resolve the conflict, particularly where, as in the instant case, this court has held that state law must be given full effect in the implementation of exemptions from creditors' claims. Holden v. Stratton, 198 U.S. 202, 25 S.Ct. 656, 49 L.Ed. 1018.

The extent of the conflict is also reflected in many of the inconsistent rulings by bankruptcy courts which attempt to reconcile, on the one hand, the rule that a debtor may

convert nonexempt assets to exempt assets on the eve of bankruptcy with what these courts sometimes find is a specific intent to hinder, delay or defraud a creditor. Thus, even though the Florida Supreme Court's decisions in Lee and Heddon do not deny or abridge the debtor's right to conver the nonexempt assets because of pending litigation, bankruptcy courts frequently cite this factor as one of the "indicia or badges of fraud" that may preclude the bankruptcy court's allowing the debtor to receive his discharge. In re Geffen, 35 B.R. 368 (Bankr. S.D. Fla. 1984); In re Schwarb, 150 B.R. 470 (Bankr. M.D.Fla. 1992).

There are only two ways to resolve this chaotic situation: Congressional action to, e.g., amend §522 of the Bankruptcy Code (as recommended by Prof. Resnick in his law review article, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L.Rev. 615, 651 (1978) (by presuming that conversions of nonexempt

property to exempt property occurring more than 90 days before the bankruptcy filing are valid and non-fraudulent and limiting conversions within the 90-day period to the extent "that such acquisition, improvement or increase in value [resulting from the conversion] exceeds the reasonable needs of the debtor or his dependents") Resnick, Id. at 651.

The other alternative is for this Court to recognize that until such time as there is a legislative solution, the federal courts cannot substitute their judgment for that of the state legislatures or the Congress. This is precisely the approach that was adopted by this court in Taylor v. Freeland & Kronz, ___ U.S. _____ , 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992), wherein the court noted that Congress, not the federal courts, had the authority to limit the application of 11 U.S.C. §522(l) to exemptions claimed in good faith. The court rejected the argument that it could judicially engraft into the statute a requirement of good

faith by stating, 112 S.Ct. 1648:

> These provisions may limit bad-faith claims of exemptions by debtors. To the extent that they do not, Congress may enact comparable provisions to address the difficulties that (the trustee) predicts will follow our decision. We have no authority to limit the application of Section 522(l) to exemptions claimed in good faith. (emphasis added)

So, too, should this court address the issue of whether a similar measure of restraint against judicial activism should be the rule of law in addressing the question: is there a federal common law of fraudulent transfers that allows a bankruptcy court to ignore the state law of the debtor's domicile as being the sole standard for assessing the propriety of his pre-bankruptcy conversions of nonexempt property to exempt property mediums? The need for a resolution of the conflict is acute.

How can one reconcile the statement by the bankruptcy court below, that: (App.-23,24)

> This court follows those decisions which have denied a debtor's discharge which found extrinsic fraud such as where there was a diversion of business assets

> into exempt property or where borrowed monies are placed into exempt property. See In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Mehrer, 2 B.R. 309 (Bankr. WA 1980); In re Collins, 19 B.R. 874 (Bankr. M.D. Fla. 1982); In re Ford, 773 F.2d 52 882 (4th Cir. 1985); In re Smiley, 864 F.2d 562 (7th Cir. 1989). (emphasis added)

with the holding of both the Florida Supreme Court's decisions in Lee and Heddon, and Spach v. Kleb, 112 So.2d 21 (3rd D.C.A. Fla. 1959), which clearly sanction a debtor's liquidation of business assets and his application of the proceeds from such liquidation to either purchase an asset exempt under Florida law or reduce a mortgage on his exempt asset? It is impossible.

III. The Present Situation in Bankruptcy Practice is Chaos and Uncertainty Among The Bankruptcy Courts; Debtors' Rights To Enjoy Effective Legal Counsel From Bankruptcy Practitioners is Jeopardized By the Uncertain Climate Now Present

Both jurists and legal scholars have noted the chilling effect this chaos, this absence of a definitive standard of law, has on the bankruptcy bar and on the right of

debtors contemplating bankruptcy of securing effective and competent legal counsel. There are no cases more illustrative of the problem now before this court than the two cases decided the same day by the Eighth Circuit: Hanson v. First National Bank, 848 F.2d 866 (8th Cir. 1988) and Norwest Bank Nebraska, N.A. v. Tveten., 848 F.2d 871 (8th Cir. 1988). [Tveten, incidentally, is the very case that the district court relied on below in the Gepfrich case to support its conclusion that a debtor's right to convert nonexempt property into exempt property "is limited by the power of the bankruptcy court to deny discharge if there is extrinsic evidence of the debtor's intent to defraud creditors." (App.-48)]

In these two cases, both debtors were doctors, engaged in the same ill-fated real estate ventures and both owed the same $19,000,000. Both used the same bankruptcy counsel; both engineered roughly $700,000 into assets then exempt under Minnesota law. Dr. Tveten lost his discharge but Dr. Hanson

received his. The reason: they drew different bankruptcy judges and both judges' findings were held not "clearly erroneous" in appeals to the District Court. In his dissenting opinion in Tveten, 848 F.2d 877-879, Judge Arnold pointed out the folly of bankruptcy judges attempting to fashion factual findings of fraud to debtors exercising their exemption privileges is discussed in depth. Judge Arnold approved the following statement by Judge Kishel in In re Johnson, 80 B.R. 953 (Bankr.D.Minn. 1987) which seems most appropriate to the instant case:

> The legislative branch alone determines what is necessary ... to meet a debtor's needs, by establishing the nature and value of the property subject to claims exemption.... To deny discharge for a debtor's non-fraudulent invocation of these protections is, overtly or covertly, to make a political and/or value judgment on these legislative determinations. To equate a non-fraudulent intent to 'place assets beyond the reach of creditors' with an invidious intent to 'hinder or delay creditors' is ultimately to frustrate statutory exemption rights by causing a chilling effect on the full exercise of those rights. A court which causes such a chilling

> effect is, in a very real sense, invading legislative prerogatives by substituting its own judgment for that of the legislature.

Surely, the substantive law of Florida is frustrated by the bankruptcy court's decision below. In like measure, the intent of Congress, in formulating the following statement of legislative intent:

> As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.[11]

is equally frustrated by the decision below.

In his article, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property

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[11] Reports to the Congress of both the Committee on the Judiciary, Senate Report No. 95-989 (reprinted in Collier Bankruptcy Code Rules and Forms (1991 ed.), page 157 and of the Committee on the Judiciary, House Report No. 95-595 (reprinted in the Collier pamphlet at page 159)

on the Eve of Bankruptcy,[12] Prof. Resnick states, 31 Rutgers L.Rev. at 643:

> Lack of uniformity in use by some courts of the nebulous purpose test to determine the nature of the debtor's conduct hampers the attorney's ability to predict with certainty when actual fraud relating to a particular conversion of nonexempt to exempt property will be found. When uncertainty is combined with the risk that a court might deprive the debtor of a discharge of his debts, the result is a chilling effect on the debtor's counsel in advising his client.

IV. The Present Absence of Definitive Guidelines for Reconciling the Competing Policy Considerations of Denying Discharge to Debtors Who Fraudulently Transfer Their Property With the Policy of Preserving As Inviolate State Law Exemption Rights is Chaos; Large Numbers of Debtors are Faced With Great Uncertainty in Attempting to Secure the Bankruptcy Fresh Start

One need only review the principal law review articles that have been written on this subject to recognize that the decision of the court of appeals for the eleventh circuit does, indeed, involve a question that is plaguing the bankruptcy bench and bar

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[12] 31 Rutgers L.Rev. 615, 651 (1978)

throughout this country. Scores of cases involving the unanticipated loss of discharge are recounted in two law review articles[13]. The problem is not abundantly dealt with by decision of the courts of appeal in more recent years, and this is due, in all likelihood, to the unfortunate application of the "clearly erroneous" rule which acts as a bar to meaningful appellate analysis of this real dichotomy between state and federal laws. The very fact that so many debtors are threatened with loss of their discharge; the very fact that the discharge itself is perhaps the most valuable incident of the unfortunate debtor's journey through the bankruptcy maze; and finally, the fact that our courts have generally recognized that in determining if a debtor has made a fraudulent transfer, the

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[13]Koger and Reynolds, Is Prefiling Engineering Prudent Planning or Section 727 Fraud? (Or, When Does a Pig Become a Hog?), 93 Comm. L.J. 465; and Resnick, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L.Rev. 615 (1978).

general rule is "a debtor who acts in reliance on the advice of his attorney lacks the intent required to deny him a discharge of his debts." Hultman v. Tevis, 82 F.2d 940, 941 (9th Cir. 1936); In re Nerone, 1 B.R. 658, 660 (Bankr.S.D.N.Y. 1979). All of these factors demonstrate the urgent need for the Supreme Court to once and for all resolve the conflict and restore order so that the lower federal courts (the bankruptcy courts, in particular) can discharge their duties as the courts of first instance in the bankruptcy system and dispatch justice to both debtors and creditors (and their legal counsel) who crave certainty and stability as they participate in the bankruptcy process.

V. The Decision of the Court of Appeals Conflicts with Decisions of Other Courts of Appeal; Additionally, the Decision Below Conflicts with the Second Circuit's Decision on the Extent to Which The Clearly Erroneous Rule Bars Condemnation of a Debtor's Pre-Bankruptcy Asset Conversion

As noted by Collier[14], many decisions[15] of the federal circuit courts of appeal have consistently held that conversion of assets

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[14] 3 Collier on Bankruptcy (15th ed.), Section 522.08[4] (Acquisition of Property to Secure Exemptions) states:

> Under section 522, the debtor may convert nonexempt property into exempt property immediately before the commencement of the case under title 11. **An eleventh hour acquisition of exempt property will not require disallowance of exemption in such property** .... (emphasis added)

See also 4 Collier on Bankruptcy (15th ed.), Section 727.02(a) (Conversion of Non-Exempt Property to Exempt Property).

[15] See, e.g., Forsberg v. Security Bank, 15 F.2d 499 (8th Cir. 191926); In Re Jackson, 472 F.2d 589 (9th Cir. 1973); Wudrick v. Clements, 451 F.2d 988 (9th Cir. 1971); Love v. Menick, 341 F.2d 680 (9th Cir. 1965); and In re Adlman, 541 F.2d 999 (2nd Cir. 1976).

immediately before bankruptcy into an exempt medium is permitted at the "eleventh hour" or on the "eve of bankruptcy" - even when the debtor is insolvent; even when the creditors are hounding him; and even when the purchase of the exempt asset is made for the express purpose of putting it out of the reach of his creditors. See, e.g., Crawford v. Sternberg, 220 F.2d 73 (8th Cir. 1915).

The decision of the court of appeals below cannot be reconciled with these decisions because the factors cited by the bankruptcy court below (the debtor's insolvency, the fact that the Respondents were in hot pursuit, and the fact that the debtor's express purpose of acquiring the annuity was to put it out of the reach of Respondents) are the very same factors that the Second, Eighth and Ninth Circuits have all held in these cases are irrelevant. The conflict is real and irreconcilable.

While findings of **fact** by a bankruptcy judge are not to be set aside unless clearly

erroneous, Bankruptcy Rule 8013, the bankruptcy court's finding below that the "Debtor's actions, in converting the certificate of deposit into the annuity, were done with the requisite fraudulent purpose to hinder, delay and defraud the wife and MILLER" was clearly erroneous because this "factual finding" resulted from the bankruptcy judge applying the wrong rule of law in the instant case. This is precisely the same error that confronted the Second Circuit in In re Adlman[16]. In contrast to the Second Circuit's realistic approach in Adlman, the district court below applied the "clearly erroneous" rule and would not disturb the bankruptcy court's findings of "fact". This type of reasoning begs the real question: Whether the debtor's conduct was

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[16] The Second Circuit in Adlman disregarded the bankruptcy judge's finding of fact that Mrs. Adlman intended to defraud creditors (when the record demonstrated that what she intended to do was to convert non-exempt property into an exempt property medium) since, as the Second Circuit stated, "(this) finding (by the bankruptcy judge) ... was induced by an erroneous view of the law." 541 F.2d 1005 (emphasis added)

fraudulent by its very nature? As demonstrated above, by reference to Florida decision law, which should be applied in accord with this court's mandate in Holden, Meyer v. United States, and Hanover National Bank, the bankruptcy judge's finding of "the requisite fraudulent purpose" by Petitioner was clearly "induced by an erroneous view of the law." The conflict with Adlman is irreconcilable and should be addressed by this Court.

VI. The Result Below Is Unduly Harsh And Is The Product of an Erroneous Decision By The Court of Appeals

Surely, there would have to be very few instances in bankruptcy jurisprudence where such an avalanche of unanticipated dire consequences is visited on the head of an unfortunate debtor such as the Petitioner. His sin was simply that he relied upon a statement of Congressional intent and clear definitive Florida decisional precedents that seemed to chart a path he could take with impunity - and certainly, without the fear that by filing

bankruptcy, he would forfeit his discharge! The result is unbelievably harsh and devastating, particularly when one looks at the innocuous exchange in the Petitioner's testimony in state court on April 17, 1989, when Petitioner was being questioned by Mrs. Gepfrich's counsel, Val Osinski, about the $100,000 C.D. There is no way that one can rationally read these few pages from the transcript of testimony (Petition, **supra**, pages 36-37) and conclude that anyone was misled about the C.D. by anything Petitioner stated that day. It simply stretches the bounds of human reason to sanction a bankruptcy judge's turning this dialogue into the instrument by which the precious right of a bankruptcy discharge is forfeited. If the essence of a fraudulent transfer is that a creditor has somehow been misled or deceived by the debtor, then surely this Court should address the case below to then answer the question: How could Mrs. Gepfrich be misled if she never even bothered to ask the circuit court to impress a lien on

or attach the $50,000 C.D.?

The devastation that now marks Petitioner as he is saddled forever with hundreds of thousands of dollars in debt, is enormous, and should furnish an additional basis for a decision by this Court to grant certiorari.

Finally, although the importance of this case to the bankruptcy bench and bar of this country and the need for a resolution of the competing state law exemption and federal fraudulent transfer prevention policies described above should alone persuade the Court to grant certiorari, the Supreme Court should also grant certiorari because all of the other holdings by the bankruptcy court were erroneous. The bankruptcy court ignored the Florida law relating to oral binders for insurance coverage and the rule that title to a cashier's check passes when the check is endorsed and delivered, not when the check clears the issuing bank.

Finally, its decision to allow the trustee to recover a $25,000 judgment for monies

the debtor **borrowed** post-petition, monies that he had the right to borrow only if he continued to render personal services under his employment contract, ignored the provision of 11 U.S.C §541(a)(6) that excludes from "property of the estate" of a debtor all earnings stemming from performance of personal services post-bankruptcy. It also ignored the fact that the so-called property interest (the right to receive what the stock purchase agreement characterized as "contingent purchase price payments") turned out to be not an asset at all, but rather a debt. The agreement provided that so long as there were profits that exceeded his draws, the debtor had the right to keep his draws. As there was only a $1.7 million loss experienced by Petitioner's employer in 1989, his draws, under the very terms of the stock purchase agreement, were never anything more than what was evidenced by the interest-bearing promissory notes the debtor executed, **a debt**.

There is no authority in bankruptcy

jurisprudence for the proposition that a debtor's right to borrow monies post-petition is an asset of the bankruptcy estate and additionally, any contractual payments that a debtor is entitled to receive because of the performance of personal services are rights that do not pass to the debtor's estate but are retained by the debtor, free of any claim by the bankruptcy trustee. In re Noonan, 17 B.R. 793 (Bankr. S.D.N.Y. 1982).

For all of these reasons, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS FRANCIS GEPFRICH, Petitioner,

v.

MARJORIE LOIS GEPFRICH; JAMES FOX MILLER and MILLER & SCHWARTZ, P.A., Respondents

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

MEMORANDUM DECISION SUSTAINING OBJECTION
AND SUPPLEMENTAL OBJECTION TO EXEMPTIONS
Filed July 6, 1990

THIS MATTER was tried on March 1, 1990, continued over to April 3, 1990, in Miami, Florida, upon the creditor's Objection to Exempt Property and Supplemental Objection, which was joined into by the Trustee. The Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of witnesses, considered the arguments of counsel, and being otherwise fully advised in the premises, it is therefore

ORDERED AND ADJUDGED that

1. This Court has entered Findings of Fact and Conclusions of Law in Adversary No.: 89-0433-BKC-AJC-A, concerning the debtor's purchase of the annuity from First Colony Life

Insurance Company, which is claimed exempt. For the reasons set forth in those Findings and Conclusions, the Court finds that the objection to exemption is sustained as to this annuity.

2. * * *

3. The debtor has also claimed as exempt his proceeds under a stock purchase agreement referred to as deferred compensation. These are monies due to the debtor from Ambassador from the sale of his Heritage stock. The debtor claims that these proceeds are wages as he alleges that the stock purchase agreement is intertwined with his employment agreement with Ambassador.

4. The evidence is undisputed from a review of the debtor's tax returns, that he receives two different forms of compensation from Ambassador. One form of compensation is treated clearly as wages, which constitutes compensation under the employment agreement. This is listed as wages on his tax returns. The other form of compensation is under the

stock purchase agreement. This is treated by the debtor on his income tax returns as installment sale income. The debtor is bound by his tax returns and cannot now claim the stock purchase proceeds as wages. Therefore, the objection to this exemption is sustained.

DONE AND ORDERED at Miami, in said District, this the 6th day of July, 1990.

A. JAY CRISTOL
United States Bankruptcy Judge

* * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ORDER DIRECTING TURNOVER
Filed July 6, 1990

THIS CAUSE came on to be heard on April 3, 1990, in Miami, Florida, upon the Trustee's Application for an Order Directing Debtor to Turnover Property to Trustee, and

the Court having heard argument of counsel and being otherwise fully advised in the premises, it is therefore

ORDERED AND ADJUDGED that

1. The Court has entered a separate Order sustaining the objections to the exemptions claimed by the debtor as to the annuity policy purchased by the debtor on the date of filing bankruptcy through First Colony Life Insurance Company, the debtor's right to receive monies under a stock purchase agreement dated March 18, 1987, and a wage account. By that separate Order, the Court has determined that these assets are not exempt.

2. The debtor shall turnover to the Trustee, forthwith, the original annuity policy number 1518193 purchased through First Colony Life Insurance Company, together with all payment received under that annuity since the date of filing, together with the proceeds of the wage account in the sum of $922.00. The debtor shall also turnover to the Trustee

all monies received under the stock purchase agreement dated March 18, 1987, since the date of filing, together with the proceeds of the wage account in the sum of $922.00.

DONE AND ORDERED at Miami, in said District this 6th day of July, 1990.

A. JAY CRISTOL
United States Bankruptcy Judge

* * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ORDER ON MOTION TO COMPEL AND ENTRY OF FINAL JUDGMENT AGAINST THOMAS GEPFRICH
Filed December 7, 1990

THIS CAUSE came on to be heard on November 119, 1990, in Ft. Lauderdale, Florida, upon the Trustee's Motion to compel directed to Thomas Francis Gepfrich and the Court having heard testimony of the debtor and

the Trustee having requested the entry of a judgment, and the Court being otherwise fully advised in the premises, it is therefore

ORDERED AND ADJUDGED that

A. The Trustee's Motion to compel turnover of the original annuity policy is rendered moot, based on the debtors turnover of that annuity at the previous hearing on November 5, 1990.

B. The Court hereby enters sanctions against the debtor in the amount of $500.00, to reimburse the Trustee for attorneys fees incurred as a result of the debtors failure to turnover the original annuity policy at an earlier date.

C. The Trustee's Motion to compel turnover as to the monies received post petition in the amount of $25,000.00 and the wage account in the amount of $922.00, is hereby denied in part however, the Court finds that the Trustee is entitled to a judgment against the debtor in these amounts.

D. The Court hereby enters judgment

against Thomas Francis Gepfrich in the amount of $25,922.00, representing the amounts collected by the debtor post petition under the stock purchase agreement and the value of the wage account, together with attorneys fees awarded as set forth above, for a total judgment of $26,422.00. Judgment is hereby entered in favor of the Trustee and against Thomas Francis Gepfrich in this amount, for all of which let execution issue.

DONE AND ORDERED at Miami, in said District, this the 7th day of December, 1990.

A. JAY CRISTOL

United States Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0433-BKC-AJC-A

THOMAS FRANCIS GEPFRICH, Plaintiff/
CounterDefendant

v.

MARJORIE LOIS GEPFRICH, JAMES FOX MILLER, and MILLER & SCHWARTZ, P.A., a Florida Professional Service Corporation, Defendants/Counter-Plaintiffs

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FINAL JUDGMENT
Filed July 6, 1990

THIS MATTER having come before this Court on April 3, 1990 at 1:30 o'clock P.M., on the continued trial in this cause, and in conformity with the Findings of Fact and Conclusions of Law entered contemporaneously with this Final Judgment, it is hereby

ORDERED AND ADJUDGED that the Debtor, THOMAS FRANCIS GEPFRICH, is denied discharge

of his debts pursuant to 11 U.S.C. Section 727(a)(2).

DONE AND ORDERED in Miami, Florida, on this 6th day of July, 1990.

A. JAY CRISTOL

United States Bankruptcy Judge

* * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0433-BKC-AJC-A

THOMAS FRANCIS GEPFRICH, Plaintiff/
CounterDefendant

v.

MARJORIE LOIS GEPFRICH, JAMES FOX MILLER, and MILLER & SCHWARTZ, P.A., a Florida Professional Service Corporation, Defendants/Counter-Plaintiffs

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
FILED JULY 6, 1990

THIS MATTER having come before this Court on April 3, 1990 at 1:30 o'clock p.m., on the bifricated (sic) trial in this cause, on the Defendant/Counter-Plaintiffs, JAMES FOX MILLER, MILLER & SCHWARTZ, P.A., n/k/a MILLER, SCHWARTZ & MILLER, P.A., (hereinafter referred to as "MILLER") and MARJORIE LOIS GEPFRICH's (hereinafter referred to as "wife") counterclaims objecting to the discharge of the Plaintiff/Counter-Defendant, THOMAS FRANCIS GEPFRICH, (hereinafter referred to as "Debtor"), under 11 U.S.C. Section 727(a)(2) and after considering the argument of counsel, the evidence submitted, the credibility and demeanor of the witnesses, and the testimony of the witnesses, the Court makes the following findings of fact and conclusions of law:

The Debtor filed his petition for relief under Chapter 7 of the United States Bankruptcy Code on June 13, 1989 at 2:27 p.m. At the time of the filing, the Debtor was insolvent in that his liabilities exceeded his

assets and he was not paying his debts as they matured. In fact the Debtor had been insolvent since May 1989.

A Final Judgment of Dissolution of Marriage was entered on the 26th day of February, 1986 which obligated the Debtor to MARJORIE LOIS GEPFRICH for child support and alimony. The state court judge in the Final Judgment of Dissolution of Marriage, found that Mrs. Gepfrich was in need of alimony and child support, as well as reasonable attorney fees. The state court decided not encumber the marital assets which included but were not limited to: Debtor's pension and profit sharing plan, a Hatteras yacht, 50% ownership interest in Heritage Quality Construction Co., Inc. and a Mercedes Benz automobile. This was done so that the Debtor would be permitted maximum flexibility to pay the financial obligations required of him under the final judgment. The Debtor and his wife were ordered to take each and every reasonable and necessary action, and to conduct themselves in

such a manner as to carry out the intent and purposes of the final judgment.

At the time of the filing of his petition in bankruptcy, the Debtor owed $200,000.00, plus an arrears of at least $20,000.00, to his wife. Additionally, the Debtor owed MILLER, the divorce attorney for MARJORIE LOIS GEPFRICH, the sum of $59,148.55 since 1986 and had not paid any sums toward the obligation since 1986.

After the Debtor defaulted under his obligations to his wife, on April 21, 1989 a hearing was conducted on the wife's Petition to Compel Payment of Lump Sum Alimony. At the contested hearing on the matter, the state court entered its order dated May 29, 1989 wherein the Court determined:

> At the time of the hearing in this matter, the Husband had sold his interest in Heritage Construction, disposed of his pension and profit sharing plan, sold his Hatteras yacht, sold his Mercedes Benz automobile, built and disposed of one (1) single family residence and at present, is living in a Two Hundred Seventy Five Thousand Dollar home encumbered by a first mortgage

> of Two Hundred Forty Thousand Dollars. The record also reflects other various asset transfers by the Husband during the approximate three (3) years from the entry of the final judgment. Due to the nature of the final judgment allowing the Husband maximum flexibility in which to utilize the assets for payment to the wife, the Court finds that the Husband, after disposing of the majority of the marital assets, failed to pay the wife the monies due her. In addition, the Husband had, pursuant to the record, at least One Hundred Thousand Dollars, in discretionary spending which he used for the purchase of stocks, a new home, and gifted approximately Fifteen Thousand Dollars to his children by a prior marriage.
>
> 7. The Court specifically finds that the Husband did not act in the spirit and intent of the Final Judgment in this matter despite the fact that each party was ordered to take each and every reasonable and necessary action and conduct themselves in such manner as to carry out the intent and purpose of the Final Judgment.

The state court concluded that the Debtor was ordered to pay to the former wife by May 21, 1989, the sum of One Hundred Seventy Thousand Dollars which was the sum due, as principal, under the final judgment. If the Debtor failed to comply with the order the

Court said it would consider, upon proper application from the wife, any remedies to compel payment including but not limited to appropriate contempt orders if available. The state court order of May 25, 1989 was affirmed by the state appellate court.

It was also at this hearing that the Debtor, through its agents, represented to the state court that he had $50,000.00 from the sale of his interest in Heritage Quality Construction, Inc. However, this sum was in the form of a certificate of deposit and was held as collateral with Ambassador Savings and Loan Association and could not be reached until at least September 1989.

After the Debtor failed to make the payment of the $170,000.00 to his former wife, the Debtor sought the advice from his bankruptcy counsel, Samuel Heller, Esquire. The Debtor learned from Mr. Heller that if he were to file a bankruptcy petition he would lose his interest in the $50,000.00 certificate of deposit to the Trustee and

creditors of this estate. The Debtor was advised that the only possible way of protecting the $50,000.00 would be to get the sum released from the bank and convert same into an annuity.

When it became apparent to the wife that the Debtor was not going to honor the state court order for payment she filed a Motion for Contempt and Sanctions against the Debtor and set the matter for hearing on June 13, 1989 at 3:00 p.m. The Debtor fearing he may be incarcerated for his failure to pay any sums as ordered contacted the representative of the bank and an insurance salesman recommended by his bankruptcy attorney for the purpose of converting the $50,000.00 certificate of deposit to an annuity.

On the day of tho scheduled contempt hearing in state court the Debtor succeeded in cashing in the certificate of deposit at a penalty and having the net proceeds of $49,012.09 issued in a cashier's check made payable to himself. Then, at a prearranged

meeting at his bankruptcy counsel's office with the insurance salesman, Mr. Williams, the Debtor endorsed the check over to First Colony Life Insurance Company. The Debtor gave the check to Mr. Williams who in turned delivered the check to First Colony Life Insurance Company's agent, E. Donald Fuerst, whose office is located in Fort Lauderdale, Florida.

Mr. Fuerst did not have banking authority and could not negotiate the check which he received about 1:50 p.m. on June 13, 1989, so by federal express at the close of business that day, he mailed the application made by the Debtor for the annuity and the cashier's check to First Colony Life Insurance Company's home office in Lynchburg, Virginia. Thus, the check was not negotiated until after the Debtor had filed his petition in bankruptcy at 2:27 p.m. on June 13, 1989.

The Debtor has claimed the annuity he purchased as exempt under Florida Statute 222.14 in this proceeding. It is with this background of these facts that the wife and

MILLER seek to have this Court deny the discharge of the Debtor for his transfer of $49,012.09 into an annuity with the intent to delay, hinder, or defraud creditors pursuant to 11 U.S.C. 727 (a)(2). The Debtor admits that one of the reasons he put the money into an annuity was to ensure that his wife and MILLER would not b able to collect against this money.

As a general rule the conversion of nonexempt assets into exempt assets is allowable. In fact both the House and Senate Reports validate this approach by stating the following: "As under current law, the debtor will be permitted to convert nonexempt property into exempt property before the filing of the bankruptcy petition. This practice is not fraudulent as to creditors, as it permits the debtor to make full use of the exemptions to which he is entitled under the law.. H.R. Rep. 95595, 95 Cong., lst Sess. 361 (1977); S. Rep. No. 95-989, 95 Cong., 2nd Sess. 76 (1978).

These comments were made in view of the federal exemptions which are more limiting than the exemptions provided under Florida Statute 222.14 which is unlimited as to amount. This general rule has limits as the conversion of nonexempt assets into exempt must be made prior to the filing and not made with the intent to defraud creditors. Where the nonexempt property is converted either post petition or is tied to a claim of a specific creditor, then the debtor's conduct will be objectionable under 11 U.S.C. 727 (a)(2). See In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Mehrer. 2 B.R. 309 (Bankr. WA 1980); In re Collins. 19 B.R. 874 (Bankr. M.D. Fla. 1982); In re Ford. 773 F.2d 52 882 (4th Cir. 1985) and In re Smiley. 864 F.2d 562 (7th Cir. 1989).

The Court finds that the property being converted by the Debtor was proceeds of the 50% ownership interest in Heritage Quality Construction, Inc., which was a marital asset. It is clear the wife had an interest in this

asset at the time of the dissolution of marriage and the state court specifically entrusted this assets[sic], as well as others, to the Debtor to allow him maximum flexibility to utilize the assets to pay the alimony obligations required under the final judgment to the wife and MILLER.

After entry of the final judgment the Debtor began liquidating the majority of the marital assets and failed to pay the wife or MILLER. This was done even when the Debtor had at least $100,000.00 in discretionary spending which he used for a new home, stocks, gifts of $15,000.00 to his children by a previous marriage and the $50,000.00 certificate of deposit.

This Court follows those decisions which have denied a debtor's discharge which found extrinsic fraud such as where there was a diversion of business assets into exempt property or where borrowed monies are placed into exempt property. See In re Reed, 700 F.2d 986 (5th Cir. 1983); In re Mehrer, 2 B.R.

309 (Bankr. WA 1980); In re Collins, 19 B.R. 874 (Bankr. M.D. Fla. 1982); In re Ford, 773 F.2d 52 882 (4th Cir. 1985); In re Smiley, 864 F.2d 562 (7th Cir. 1989). Here, after considering the amounts involved, the timing, the fact that the proceeds were derived from marital assets the wife had an interest in, the misleading impression given to the wife and the state court as to the availability of the certificate of deposit and the insolvency of the Debtor clearly supports the conclusion that the Debtor's actions, in converting the certificate of deposit into the annuity, were done with the requisite fraudulent purpose to hinder, delay and defraud the wife and MILLER. For the Court to conclude otherwise would set the precedent to allow parties obligated under marital decrees to convert all of the marital properties into annuities or exempt property to avoid the obligations called for under such decrees.

The Debtor argues that the prior ruling of In re Blum, 41 B.R. 816 (Bankr. S.D. Fla.

1984) should govern this case. In Blum the Court stated the mere act of converting property into exempt property, without more is not prohibited by the Bankruptcy Code. Here the facts and circumstances are clearly distinguishable from those presented in Blum.

The Court also concludes that the transfer into the annuity was not completed prior to the filing of the bankruptcy petition.

The Court follows the Uniform Commercial Code and those decisions which hold that the transfer of a check occurs when the check is honored by the bank. Fitzpatrick v. Philco Finance Corp., 491 F.2d 1288 (7th Cir. 1974) and In re Sims Office Supply, Inc., 18 B.C.D. 1006 (Bankr. M.D. Fla. 1988).

Here it is clear the check could not have been negotiated until it was received by the home office of First Colony Life Insurance Company in Lynchburg, Virginia, which was not until June 14, 1989, the day after the filing of the petition in bankruptcy. Thus, the

transfer was an improper post petition transfer clearly made with the intent to delay, hinder and defraud not only the former wife and MILLER, but also the Trustee.

Consequently, a separate judgment will be entered in this adversary in accordance with these findings of fact and conclusions of law.

Dated: July 6, 1990

A. JAY CRISTOL

United States Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0465-BKC-AJC-A

DANIEL L. BAKST, Trustee

v.

THOMAS FRANCIS GEPFRICH, Defendant

FINAL JUDGMENT
Filed July 6, 1990

In conformity with the Findings of Fact and Conclusions of Law of even date, it is hereby

ORDERED AND ADJUDGED

A. Judgment is hereby entered in favor of the Trustee, Daniel L. Bakst against the debtor/defendant, THOMAS FRANCIS GEPFRICH. The debtor's purchase of an annuity from First Colony Life Insurance Company in the amount of $49,012.09 is hereby avoided as a post-petition transfer pursuant to 111 U.S.C. Section 549 or in the alternative, as a fraudulent transfer pursuant to 11 U.S.C. Section 548.

DONE AND ORDERED at Miami, Florida, this 6th day of July, 1990.

A. JAY CRISTOL

United States Bankruptcy Judge

* * * * * * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0465-BKC-AJC-A

DANIEL L. BAKST, Trustee

v.

THOMAS FRANCIS GEPFRICH, Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FILED JULY 6, 1990

THIS CASE was tried by the Court on March 1, 1990, continued over to April 3, 1990, in Miami, Florida. The Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of witnesses and considered the arguments of counsel, and being otherwise fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law:

The Trustee, DANIEL L. BAKST, filed an Amended Complaint Objecting to Discharge and

to set aside fraudulent transfer, as well as a further amendment to add a count under Section 549. The Court has entered separate findings and conclusions concerning the objection to discharge. The debtor has filed an answer raising several affirmative defenses. The issue to be determined is whether the Trustee can set aside the debtor's purchase of an annuity as a fraudulent transfer under 11 U.S.C. §548, or as a post-petition transfer under 11 U.S.C. §549.

Many of the facts in this case are undisputed. In 1987, the debtor sold stock in a company known as Heritage Quality Construction Company, Inc. The stock was sold to Ambassador Real Estate Equities Corporation. Out of the proceeds of sale, $100,000.00 was placed into a certificate of deposit at Ambassador Savings and Loan Association. The debtor had a one-half interest in these proceeds. The other one-half interest belonged to another stockholder, Ronald Blum. Although the funds were

allegedly subject to a lien in favor of Ambassador until September, 1989, the lien was released on the morning of June 13, 1989, and the debtor took his one-half interest in the funds and purchased an annuity. The actual check received from Ambassador was used to purchase the annuity in the amount of $49,012.09, which represented the proceeds from the certificate of deposit less a penalty for early withdrawal.

The debtor filed his voluntary petition under Chapter 7 at 2:27 P.M. on June 13, 1989. The debtor had to file his petition before 3:00 P.M. that day in order to avoid a hearing in State Court on a motion to hold him in contempt filed by his ex-wife, Marjorie Gepfrich. The debtor had a fear of going to jail and filed bankruptcy in order to avoid this hearing and also the monetary obligations owed to his ex-wife and her attorneys. The debtor testified that bankruptcy was the only option he had to relieve himself from enforcement of a lump sum alimony award that

he was unable to pay.

In June, 1989, the debtor sought the advice of Samuel Heller, his bankruptcy counsel. The first meeting with Mr. Heller was on June 7, 1989. The subject of annuities was discussed. The debtor was well aware that he would lose his one-half interest in the certificate of deposit if he filed bankruptcy, and that if he placed it into an annuity, he could claim the annuity as exempt. There is a conflict in testimony of the debtor concerning the date that he first contacted Steve Eppel at Ambassador concerning a release of the lien on the certificate of deposit. In an affidavit filed with the Court to support his Motion for Summary Judgment, the debtor stated that he and Mr. Blum had already. had informal discussions with Mr. Eppel long before the bankruptcy and that Eppel told the debtor and Blum in May 1989 that Ambassador would release the lien pledge whenever they wanted it. The debtor later recanted that testimony at the time of trial, which is also contrary to the

testimony of Blum and Eppel. The Court has considered this inconsistent testimony in determining the credibility of Mr. Gepfrich, who waited until the second day of trial to change his testimony from that contained in an affidavit filed with the Court several months prior.

The debtor was able to easily obtain the funds from Ambassador on the morning of June 13, 1989. The check was taken to Samuel Heller's office for a meeting which had been set up with Sam Williams. Sam Williams had been referred to Mr. Gepfrich by Mr. Heller. Mr. Williams is a certified financial planner with a life insurance license. Mr. Williams testified that he was a broker for First Colony Life Insurance Company in Virginia, as well as other life insurance companies.

Mr. Williams was aware that the debtor had problems with his ex-wife. He had been told that the debtor was planning to file bankruptcy that same day, and that the policy had to be in force on June 13, 1989. The

meeting took place in Samuel Heller's office around 12:00 noon on June 13, 1989. Mr. Williams left the office sometime before 1:50 p.m. The application is dated 1:05 p.m. with a special request that the policy be dated June 13, 1989. These notations are in the handwriting of Sam Williams.

Mr. Williams then left Samuel Heller's office to go to the office of Douglas Fuerst, a general agent for a number of life insurance companies, including First Colony Life Insurance Company of Virginia. His office is in Ft. Lauderdale, Florida. Douglas Fuerst testified that the first time he learned of the annuity was on the morning of June 13, 1989, at approximately 11:00 a.m., when he was contacted by Sam Williams who stated that he needed a policy that day. Both Sam Williams and Douglas Fuerst testified that this was an extraordinary request, and that they had never before handled this type of unusual request.

A facsimile was sent by Sam Williams to Samuel Heller from the office of Douglas

Fuerst at approximately 1:50 P.M. Douglas Fuerst testified that he was out to lunch from approximately 1:00 to 2:00 P.M. There is no direct facsimile from Douglas Fuerst to Samuel Heller. Douglas Fuerst did testify that he called his home office to see if he could date the policy the same date that he received the money. He also testified that he had no authorization to deposit the check on behalf of First Colony Life Insurance Company of Virginia. A copy of the check and application was not telecopied to the home office until 3:11 P.M. on June 13, 1989, which was after the filing of the bankruptcy petition. The actual check and original application were not deposited into the mail until after 5:00 P.M. on June 13, 1989, when they were sent by overnight delivery to First Colony Life Insurance Company in Virginia. The check mailed was the third party check from Ambassador made out to Thomas Gepfrich, and endorsed over to First Colony Life Insurance Company of Virginia. The policy was not

physically issued until June 15, 1989, and was not delivered to the debtor until sometime after June 20, 1989.

Douglas Fuerst testified that had the check not cleared, the policy would have been cancelled. The only reference to the June 13, 1989 date on the policy itself is the effective date. This is the date that interest begins to accrue. The issue date of the policy is June 15, 1989.

The issue before the Court is whether the policy was operable before the filing of the bankruptcy, or after the filing of the bankruptcy. Although the debtor attempted to shield his assets from his creditors by purchasing an annuity just minutes before he filed bankruptcy, the Court finds that this attempt failed. The policy itself was issued after the filing of bankruptcy with a retroactive date back to before the filing of the bankruptcy. The insurance company was not even sent a facsimile of the application or the check until 3:11 P.M. on June 13, 1989,

which was after the time of the filing of the bankruptcy. The check and application were delivered the next day, and the policy issued on June 15, 1989. The transfer did not occur until the check was honored by the bank, pursuant to the Uniform Commercial Code at Florida Statute Section 673.409; and In Re: Sims Office Supply, Inc., 18 B.C.D, 1006 (M.D. Fla. 1988). The Court finds that this is a post-petition transaction, avoidable by the Trustee pursuant to 11 U.S.C. §549.

In the alternative, the Court finds that the purchase of this annuity within minutes of the filing of the bankruptcy, was not permissible pre-bankruptcy planning, and was done with the intent to hinder, delay and defraud creditors. In the absence of other facts, the mere purchase of the annuity would not be fraudulent. In this particular case however, the ex-wife had attempted to reach the certificate of deposit in earlier proceedings before the State Court in the post-dissolution proceeding. In a State Court

proceeding on April 17, 1989, the debtor testified before the State Court that the certificate of deposit could not be reached until September, 1989. Yet, the debtor was able to reach these funds on the morning of his bankruptcy proceeding in order to purchase the annuity, which he has claimed as exempt in his bankruptcy proceeding. This transfer of non-exempt assets into an exempt annuity was a fraud with regard to the debtor's ex-wife and her attorneys who had been trying to reach this particular asset earlier. The funds used to purchase the annuity came from the sale of a business interest. The debtor was aware of pending litigation and testified he was insolvent. See In re: Gefen, 35 B.R. 368 (S.D. Fla. 1984). Therefore, the Court finds in the alternative that this was a fraudulent transfer pursuant to 11 U.S.C. §548, avoidable by the Trustee.

A separate Final Judgment of even date

has been entered in conformity herewith.

July 6, 1990

A. JAY CRISTOL

United States Bankruptcy Judge

****

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0465-BKC-AJC-A

DANIEL L. BAKST, Trustee

v.

THOMAS FRANCIS GEPFRICH, Defendant

ORDER DETERMINING PLAINTIFF'S MOTION
TO ALTER OR AMEND FINAL JUDGMENT
Entered August 28, 1990

THIS MATTER Came On for hearing before the Court on August 6, 1990 on the Motion to Alter or Amend Final Judgment filed by Plaintiff Thomas Francis Gepfrich, and the

Court having considered argument of counsel, it is therefore

ORDERED by the Court as follows:

1. The Debtor's request in Paragraph 1 (PART I) of the aforementioned motion is granted; the Court will enter an amended final judgment separately adjudicating each of the Trustee's claims for relief against the Debtor in Counts I, II and II of the Trustee's Amended Complaint.

2. The Debtor's request in Paragraph 2 (PART I) that the Court amend the following statement that appears on the third and fourth pages of the Court's seven-page Findings of Fact and Conclusions of Law entered July 6, 1990, to-wit:

> There is a conflict in testimony of the debtor concerning the date that he first contacted Steve Eppel at Ambassador concerning a release of the lien on the certificate of deposit. In an affidavit filed With the Court to support his Motion for Summary Judgment, the debtor stated that he and Mr. Blum had already had informal discussions with Mr. Eppel long before the bankruptcy and that Eppel told the debtor and Blum in May 1989 that Ambassador would

> release the lien pledge whenever they wanted it. The debtor later recanted that testimony at the time of trial, which is also contrary to the testimony of Blum and Eppel. The Court has considered this inconsistent testimony in determining the credibility of Mr. Gepfrich, who waited until the second day of trial to change his testimony from that contained in an affidavit filed with the Court several months prior ....

be and the same, is hereby denied.

3. The Debtor's request in Paragraph 3 of PART II of said motion that the Court amend its Final Judgment so as to adjudicate each of the several claims for relief relating to denial of the Debtor's discharge (by reason of the fraudulent transfer within the year preceding bankruptcy) is granted; the Court will enter separate amended final judgments in favor of the Trustee and against the Debtor in Adversary No. 89-0465-BKC-AJC-A and in favor of Marjorie Lois Gepfrich and her attorneys and against the Debtor in Adversary No. 89-0433-BKC-AJC-A.

4. The Debtor's request in Paragraph 4 of PART II of said motion that the Court make

a Rule 54(b) determination is moot in vieW of the fact that (in the Amended Final Judgment being entered this day) the Court is fully adjudicating all claims for relief in both Adversary No: 89-0433-BKC-AJC-A and Adversary No: 89-0465-BKC-AJC-A, and therefore said request for a Rule 54(b) determination is hereby denied.

ORDERED at Miami, Florida this 28th day of August, 1990.

A. JAY CRISTOL
United States Bankruptcy Judge

****

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 89-22892-BKC-AJC

In Re THOMAS FRANCIS GEPFRICH, Debtor

ADV. NO. 89-0465-BKC-AJC-A

DANIEL L. BAKST, Trustee

v.

THOMAS FRANCIS GEPFRICH, Defendant

AMENDED FINAL JUDGMENT
Filed August 28, 1990

THE COURT having this day entered its Order Determining Plaintiff's Motion to Alter or Amend Final Judgment and in conformity with the Findings of Fact and Conclusions of Law entered by the Court July 6, 1990, it is therefore

ORDERED and ADJUDGED as follows:

1. With respect to Count I of the Trustee's amended complaint, judgment is hereby entered in favor of the Trustee, Daniel

L. Bakst and against Debtor/Defendant Thomas Francis Gepfrich and the Debtor, Thomas Francis Gepfrich, is denied a discharge of his debts pursuant to 11 U.S.C. Section 727(a)(2).

2. With respect to Count II of the Trustee's amended complaint, judgment is hereby entered in favor of the Trustee, Daniel L. Bakst and against Debtor/Defendant Thomas Francis Gepfrich. The Debtor's purchase of an annuity from First Colony Life Insurance Company in the amount of $49,012.09 is hereby avoided as a fraudulent transfer pursuant to 11 U.S.C. Section 548.

3. With respect to Count III of the Trustee's amended complaint, judgment is hereby entered in favor of the Trustee, Daniel L. Bakst and against Debtor/Defendant Thomas Francis Gepfrich. The Debtor's purchase of an annuity from First Colony Life Insurance Company in the amount of $49,012.09 is hereby avoided as a post-petition transfer pursuant to 11 U.S.C. Section 549.

4. The provisions of this amended final

judgment shall supersede the final judgment entered on July 6, 1990.

ORDERED at Miami, Florida this 28th day of August, 1990.

A. JAY CRISTOL

United States Bankruptcy Judge

****

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-6398-CIV-GONZALEZ

In Re THOMAS FRANCIS GEPFRICH, Debtor

THOMAS FRANCIS GEPFRICH, Plaintiff/
Counterdefendant/Appellant,

v.

MARJORIE LOIS GEPFRICH, et al.,
Defendants/Counterplaintiffs/Appellees

THOMAS FRANCIS GEPFRICH,
Defendant/Appellant,

v.

DANIEL L. BAKST, TRUSTEE,
Plaintiff/Appellee

ORDER
Filed August 20, 1992

THIS CAUSE has come before the Court upon the debtor Thomas Francis Gepfrich's consolidated appeal from five appealable orders and judgments of the United States Bankruptcy Court for the Southern District of Florida. The parties have briefed the issues fully, and the Court heard argument of counsel on Friday, May 29, 1992. For the reasons explained below, the Court will affirm the orders and the judgments of the bankruptcy court.

Standard of Review

In considering an appeal from the United States Bankruptcy Court, this Court reviews the bankruptcy court's conclusions of law de novo. See In Re Sublett, 895 F.2d 1381, 1383 (11th Cir. 1990). Where an issue raises a mixed question of law and fact, the Court likewise will review the bankruptcy court's determinations de novo. In Re Mader, 108

Bankr. 643, 644 (N.D. Ill. 1989). However, this Court will not overturn the bankruptcy court's factual findings unless the Court determines that those findings are clearly erroneous. In Re Pepenella. 103 Bankr. 299, 300 (M.D. Fla. 1988).

Issues Presented

The debtor's consolidated appeal presents six questions:

> (1) Whether the bankruptcy court erred in determining that the debtor's annuity purchase was not completed until after he filed his bankruptcy petition?
>
> (2) Even if the debtor did complete the annuity purchase pre-petition, whether the bankruptcy court erred in determining that the purchase constituted a fraudulent transfer which justified a denial of the debtor's discharge?
>
> (3) If the bankruptcy court did err in invalidating the annuity purchase and in denying the discharge, whether the bankruptcy court also erred in dismissing the debtor's adversary complaint which sought to determine the dischargeability under 11 U.S.C. § 523(a)(5)(B) of the debtor,s obligation to pay his ex-wife a $270,000 equitable distribution award and his obligation to pay some $60,000 in attorney's fees to his ex-wife,s attorneys?

(4) Whether the bankruptcy court erred in entering a turnover order and a separate money judgment in the amount of $25,000 against the debtor and in favor of the trustee representing the debtor,s post-petition receipt of monies under his stock purchase agreement with Ambassador?

(5) Whether the bankruptcy court erred in excluding the testimony of Ambassador Vice-President Thomas Blake?

(6) Whether the bankruptcy court erred in denying the debtor's claim of exemption for wages in the amount of $922 where one of the objecting parties was the debtor's ex-wife who held a claim against the debtor for alimony?

The Court will address each issue separately.

Discussion

The debtor first claims that the bankruptcy court erred when it found that the debtor did not purchase the subject annuity until after the debtor filed his bankruptcy petition. It is unnecessary, however, for the Court to pass on this issue because even if the Court assumes the annuity was purchased pre-petition, the Court finds that the bankruptcy court correctly invalidated the annuity purchase and denied the debtor's

discharge on the ground that the purchase of the annuity constituted a fraudulent transfer under 11 U.S.C. §§ 548 and 727.

As a general rule, a debtor's conversion of non-exempt property into exempt property, in and of itself, will not work to deprive a debtor of an exemption to which the debtor otherwise would have been entitled. Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871, 873-74 (8th Cir. 1988). However, this rule is limited by the power of the bankruptcy court to deny a discharge if there is extrinsic evidence of the debtor's intent to defraud creditors. Id. at 874. Evidence that the debtor transferred property "with intent to hinder, delay, or defraud a creditor" within one year before the date of the filing of the petition will suffice to allow the Court to deny a discharge. See 11 U.S.C. § 727(a)(2). A bankruptcy court's finding that a debtor made a pre-petition transfer with the intent to hinder, delay, or defraud may be reversed only if clearly erroneous. McCormick v.

Security State Bank, 822 F.2d 806, 808 (8th Cir. 1987).

After careful consideration of the record and the arguments of the parties, the Court finds that the debtor has not demonstrated that the bankruptcy court's finding concerning the debtor's intent was clearly erroneous. Accordingly, this Court will affirm those orders and judgments of the bankruptcy court which invalidated the purchase of the annuity and denied the discharge. See In Re Reed, 700 F.2d 986 (5th Cir. 1983); Tveten, supra, 848 F.2d 871.

Because the Court will affirm the bankruptcy court's invalidation of the annuity purchase and the denial of the discharge, the Court further finds that the bankruptcy court did not err in dismissing as moot the debtor's adversary complaint-- which complaint sought to determine the dischargeability under 11 U.S.C. § 523(a)(5)(B) of the debtor's obligation to pay his ex-wife a $270,000 equitable distribution award and his

obligation to pay some $60,000 in attorney's fees to his ex-wife's attorneys.

Next, the debtor contends that the bankruptcy court erred in issuing a turnover order, and ultimately a separate money judgment, in the amount of $25,000 against the debtor and in favor of the trustee, representing the debtor,s post-petition receipt of monies under the stock purchase agreement he had entered into with Ambassador. After the debtor sold his Heritage stock to Ambassador in 1987 he received each month a salary of $5,000 under his employment contract and $3,080 per month pursuant to the 1987 stock purchase agreement. At issue are the monies received under the stock purchase agreement. The bankruptcy court characterized these monies as "stock purchase proceeds" and sustained the objection to the debtor's exemption. The debtor argues that this characterization was error. In response, the trustee contends that the subject monies were proceeds received from the sale of an asset

and therefore are property of the estate pursuant to 11 U.S.C. § 541.

The debtor has not persuaded the Court that the bankruptcy court erred in characterizing the subject monies as proceeds from the sale of the Heritage stock. Therefore, the Court finds that the bankruptcy court properly sustained the objection to the exemption and ordered the turnover of the $25,000. Additionally, the Court finds that the bankruptcy court did not commit reversible error when it sustained the objection to the testimony of Thomas Blank.

Finally, the debtor contends that the bankruptcy court erred in denying the debtor's claim that $922 of wages held in an ear-marked wage account at the time of bankruptcy was exempt. Wages are not exempt from creditors holding claims for alimony. See Fla. Stat. § 61.12. The debtor,s ex-wife, who obtained an alimony judgment against the debtor, objected to the exemption of the $922. Accordingly, the bankruptcy court correctly denied the

exemption as to the wage account.

Accordingly, having reviewed the record, and being otherwise duly advised, it is hereby:

ORDERED and ADJUDGED that the orders and judgments of the United States Bankruptcy Court for the Southern District of Florida, which orders and judgments were consolidated for the purposes of this appeal, are AFFIRMED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 19th day of August, 1992.

JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

****

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 92-4858

In Re THOMAS FRANCIS GEPFRICH, Debtor

THOMAS FRANCIS GEPFRICH, Plaintiff-Counterclaim Defendant-Appellant,

v.

MARJORIE LOIS GEPFRICH, JAMES FOX MILLER, and MILLER & SCHWARTZ, P.A., a Florida Professional Service Corporation, Defendants-Counterclaim Plaintiffs-Appellees

---

DANIEL L. BAKST, TRUSTEE, Plaintiff-Appellee

v.

THOMAS FRANCIS GEPFRICH, Defendant-Appellant,

v.

ORDER
Filed October 19, 1993

BEFORE: FAY and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-

1....

Judgment Entered: October 19, 1993

For The Court: Miguel J. Cortez, Clerk
By: Karleen McNabb, Deputy Clerk

ISSUED AS MANDATE: December 8, 1993

ENTERED FOR THE COURT:

Ed Carnes
United States Circuit Judge

****

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO: 92-4858

In Re THOMAS FRANCIS GEPFRICH, Debtor

THOMAS FRANCIS GEPFRICH, Plaintiff-Counterclaim Defendant-Appellant,

v.

MARJORIE LOIS GEPFRICH, JAMES FOX MILLER, and MILLER & SCHWARTZ, P.A., a Florida Professional Service Corporation, Defendants-Counter-claim Plaintiffs-Appellees

---

DANIEL L. BAKST, TRUSTEE,
Plaintiff-Appellee

v.

THOMAS FRANCIS GEPFRICH,
Defendant-Appellant,
v.

ORDER
Filed November 30, 1993

ON PETITION FOR REHEARING

BEFORE: FAY and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM: The petition for rehearing filed by appellant Thomas Francis Gepfrich is DENIED.

ENTERED FOR THE COURT:

Ed Carnes
United States Circuit Judge

****

TESTIMONY OF JOSEPH M. GUILLOTTI

In the Circuit Court of the
Seventeenth Judicial Circuit
In and For Broward County, Florida

Case No. 83-23375 CO (Price)

In Re the Marriage of

MARJORIE LOIS GEPFRICH, Petitioner/Wife,

and

THOMAS F. GEPFRICH, Respondent/Husband.

On April 20, 1989 before the Honorable J. Cail Lee, Circuit Judge, the following proceedings were had in the above-styled and number cause:

Appearances: Val Osinski, Esq., Coral Springs, Florida, for Petitioner/Wife

Gary Maisel, Esq.

for Respondent/Husband

PROCEEDINGS

* * *

JOSEPH M. GUILLOTTI, then called as a witness on behalf of Respondent/Husband being first duly sworn, was examined and testified on his oath as follows:

By Mr. Maisel:

Q Mr. Osinski mentioned there was a hundred thousand dollar C.D. remaining in Mr. Gepfrich's name and I believe Mr. (Blum's) name; are you with familiar with that?

A Yes, I am.

Q How did that C.D. come about?

A That's additional sale price on

the sale to Ambassador Savings and Loan ... I forget the terms, but at the end of two years if they didn't have to forfeit the money for, you know, the company losing money, not making money, I forget the exact terms, the money would be available to them.

Q Out of the hundred thousand dollars, if it is received, how much of that would be Mr. Gepfrich's?

A $50,000.

Q When is that due and owing?

A September, 1989.

Q Is that guaranteed that he will get the money or are there conditions upon receiving --

A No, there are conditions ....

* * *

Q And if he receives it at all it would be September, 1989?

A Yes. (Cir.Tr. 4/20/89, P 27, L 12-18, 23-25; P 28, 1-14, 24-25; P 29, L 1)

****

STATUTES INVOLVED

1. §222.11, Florida Statutes (Exemption of wages from garnishment):

> No writ of attachment or garnishment or other process shall issue from any of the courts of this state to attach or delay the payment of any money or other thing due to any person who is the head of a family residing in this state, when the money or other thing is due for the personal labor or services of such person. As used in this section, the term "head of family" includes any unmarried, divorced, legally separated, or widowed person who is providing more than one-half of the support for a child or other dependent. This exemption shall apply to any wages deposited in any bank account maintained by the debtor when said funds can be traced and properly identified as wages.

2. §222.14, Florida Statutes (Exemption of cash surrender value of life insurance policies and annuity contracts from legal process):

> The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state and the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the

insurance policy or annuity contract was effected for the benefit of such creditor.

3. 11 U.S.C. §541 (Property of the estate):

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate except such as are earnings from services performed by an individual debtor after the commencement of the case.

* * *

4. 11 U.S.C. §548 (Fraudulent transfers and obligations):

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily

(1) made such transfer or incurred such obligation with actual

intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

* * *

5. 11 U.S.C. §549 (Postpetition transactions):

(a) Except as provided in subsection (b) or in (c) of this section, the trustee may avoid a transfer of property of the estate -

(1) that occurs after the commencement of the case; and

* * *

6. 11 U.S.C. §727 (Discharge):

(a) The court shall grant the debtor a discharge, unless -

* * *

(2) The debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -

(a) property of the debtor within one year before the date of the filing of the petition; or

* * *

Supreme Court, U.S.
FILED
MAR 31 1994
OFFICE OF THE CLERK

No. 93-1371

In The

Supreme Court of the United States

October Term, 1993

THOMAS FRANCIS GEPFRICH,

Petitioner,

vs.

MARJORIE LOIS GEPFRICH; JAMES FOX MILLER and MILLER & SCHWARTZ, P.A.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT, DANIEL L. BAKST, TRUSTEE BRIEF IN OPPOSITION

ACKERMAN, BAKST & CLOYD, P.A.

DANIEL L. BAKST, ESQ.
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STATEMENT OF THE CASE

The Respondent, DANIEL L. BAKST, Trustee in bankruptcy, hereinafter referred to as Respondent/Trustee is filing a statement of the case to the extent deemed necessary to correct inaccuracies or omissions in the statement filed by the Petitioner, pursuant to Supreme Court Rule 15. Further, many portions of Petitioner's statement of the case contain improper argument.

A. Denial Of Discharge For Pre-bankruptcy Planning (Asset Conversions On The Eve Of Bankruptcy)

Petitioner does not set forth facts under this section, but argues his case.

B. Background; Origin Of The Equitable Distribution (Property Settlement) Debt To Mrs. Gepfrich

Respondent/Trustee has no comments concerning this section of the statement of the case.

C. Background; Origin Of Petitioner's $50,000.00 Certificate Of Deposit ("The CD")

When the Petitioner and Ronald Blum sold their Heritage stock, they each received a cash sum of $124,700.50. Out of these monies, they each placed $50,000.00 in a certificate of deposit, for a total sum of $100,000.00. The actual purchase price of the stock was much greater, due to the inclusion of contingent purchase price monies. In the stock purchase agreement dated March 18, 1987, the agreement refers to an additional purchase price equal to 50% of earnings, up to the sum of $240,000.00 for each

stockholder, after which the percentage then dropped to 40%.

D. Bankruptcy Filing To Avoid Jailing For Failure To Pay Equitable Distribution Debt: The Decision To Buy The Exempt Annuity

In the Circuit Court divorce proceeding, the State Court entered an Order on May 25, 1989, reciting the liquidation of assets by the Petitioner, and ordering him to pay the balance of the lump sum alimony in 26 days. The Petitioner testified at trial that he first considered the possibility of filing bankruptcy in late May 1989. At that time, the Petitioner was involved in the State Court divorce proceeding, and was faced with a contempt order for failure to pay lump sum alimony. The hearing scheduled on contempt was set for June 13, 1989 at 3:00 p.m. and the Petitioner feared that he would go to jail as a result of that contempt hearing. When the Petitioner met with Steve Eppel at Ambassador to release the pledge on the CD, he explained to Mr. Eppel that he was in the process of filing a bankruptcy because of his lengthy divorce and the problems that it caused with his financial position.

The Petitioner testified at trial that he was insolvent in May 1989, as his liabilities exceeded his assets and he was unable to pay his debts as they fell due. The Petitioner testified that he had been advised by bankruptcy counsel that he could possibly have his discharge denied if the purchase of the annuity was considered a transfer with the intent to hinder, delay or defraud creditors. The Petitioner stated that he was specifically trying to keep the money away from James Fox Miller, his former wife's

attorney and also his former wife due to the contempt matter coming up.

E. Florida's Liberality - Treating Insolvent Debtors' Asset Conversions To Exempt Property As Non-Fraudulent

Petitioner does not set forth facts under this section, but argues his case.

F. Purchase Of The Annuity 37 Minutes Before Bankruptcy; The Oral Binder For Annuity Coverage; The Cashier's Check

Sam Williams, the life insurance broker who prepared the application for the annuity, testified that Petitioner first called him within three to six weeks prior to June 13, 1989. The next contact with Petitioner after that time was in Sam Heller's office, Petitioner's bankruptcy counsel, on the day the bankruptcy was filed. Later on cross examination, Sam Williams recalled that Petitioner first contacted him in the last week of May 1989. Mr. Williams recalled that during the last week of May 1989, the Petitioner had mentioned that he had gone through a divorce and that there was a discussion about assets being excluded from creditors.

Douglas Fuerst testified at the first trial concerning the purchase of the annuity. Douglas Fuerst was a general agent or wholesaler for a variety of life insurance companies, including First Colony Life. Mr. Fuerst, who is not related or connected with First Colony except for being a general agent, was first contacted at 11:00 a.m. on June 13, 1989, concerning the issuance of the annuity policy. He was contacted by Sam Williams who indicated that he had a client who wanted to purchase an annuity policy

and that they wanted to have it issued that same day. Mr. Fuerst indicated that this was an unusual request and that he had never done that before. Mr. Fuerst called the company vice president, Linda Mayhu, for approval, who approved it based on the size of the annuity. As a result, the interest related back to the effective date of the policy, which was June 13, 1989.

Mr. Fuerst made it clear that he was not empowered by the company to accept money on behalf of First Colony, or to put it into his own bank account. The application for the annuity came into Douglas Fuerst's office around 1:00 or 1:30 p.m. while he was at lunch. He came back from lunch after an hour and faxed it to the insurance company. The date of the fax to First Colony was 3:11 p.m., after the filing of the bankruptcy proceeding at 2:27 p.m. that day. The application and the check were faxed to the home office at 3:11 p.m., and dropped in the Federal Express at 5:00 p.m. on June 13, 1989. The policy was physically issued on June 15, 1989.

The check that was sent to First Colony was a cashier's check from Ambassador to Thomas Gepfrich. That check was later endorsed by the Petitioner paid to the order of First Colony Life Insurance Company.

G. Litigation Regarding The Annuity Purchase

Respondent/Trustee has no comments concerning this section of the statement of the case.

H. Petitioner's Conflicting Testimony: Significant Or Not Significant?

There is a discrepancy in the Petitioner's testimony concerning the date that he first contacted Ambassador to

liquidate the certificate of deposit, which was used to buy the annuity. In an affidavit filed with the Bankruptcy Court in support of summary judgment, the Petitioner swore under oath that he first contacted Ambassador concerning the release of lien on the certificate of deposit in May 1989. At trial, the Petitioner testified that he did not discuss the early release of lien with Steve Eppel at Ambassador until June 8th or 9th, 1989. Steve Eppel testified that he saw Petitioner on June 8th or 9th, 1989. The matter of the conflicting affidavit was brought up during Steve Eppel's testimony at the first trial, in the presence of Petitioner. Petitioner's counsel later sought to correct the conflicting affidavit at the second trial on April 3, 1990.

I. Bankruptcy Court's Rulings On The Annuity Purchase

Petitioner does not set forth facts under this section, but argues his case.

J. Litigation Regarding The $25,000.00 In Post-petition Draws By Petitioner

Under the stock purchase agreement, the Petitioner treated all payments of the contingent purchase price as installment sale income and not wage income. This was set forth on the Petitioner's 1987 and 1988 income tax returns, introduced at trial. In both of those years, the Petitioner also received separate wages from Heritage, which were treated as wage income on the same income tax returns. The Petitioner further testified that he took money under the stock purchase agreement after the filing of the bankruptcy proceeding for the contingent purchase price, and spent those monies. Those funds

were not turned over to the Respondent/Trustee, although they were assets of the bankruptcy estate.

K. Bankruptcy Court's Rulings Regarding $25,000.00 In Post-petition Draws

Respondent/Trustee has no comments concerning this section of the statement of the case.

SUMMARY OF THE ARGUMENT

POINT I

The decision of the Eleventh Circuit Court of Appeals does not conflict with any prior decisions of the United States Supreme Court. The Court's decision did not affect the validity or scope of the Petitioner's exemptions under state law. Therefore, there is no conflict.

POINT II

The decision of the Eleventh Circuit Court of Appeals does not create a conflict on an issue of state law with any decision rendered by the Florida Supreme Court. The Eleventh Circuit properly affirmed the lower court's decision that the Petitioner's purchase of the annuity, under the circumstances surrounding it, constituted a fraudulent transfer pursuant to 11 U.S.C. § 548, and warranted denial of his discharge pursuant to 11 U.S.C. § 727(a)(2).

POINT III

There is no chaos or uncertainty among the Bankruptcy Courts, or in bankruptcy practice. In matters

involving fraudulent transfers or denial of discharge, the Bankruptcy Court sits as a trier of fact. It is clear under existing law that a debtor's discharge may be denied if non-exempt assets are transferred into exempt assets, where extrinsic evidence of the debtor's intent to defraud creditors exists.

POINT V

Decisions made by the trier of fact can only be set aside if there is a showing that the lower court clearly abused its discretion. In Bankruptcy Court trials, this is most often the Bankruptcy Judge that makes these decisions. The fact that Courts of Appeal rule in favor of the creditor in one instance, and the debtor in another, based on different sets of fact, does not create a conflict.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THE SUPREME COURT

Respondent/Trustee agrees with Petitioner's statement that the validity and scope of a debtor's exemptions are controlled by state law. There is absolutely nothing in the Court of Appeals decision that conflicts with any decision by the United States Supreme Court. Nothing in the decision affects the exemption itself, only the transfer that created the exemption. Petitioner is attempting to create a conflict where none exists.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT ON AN ISSUE OF STATE LAW WITH DECISIONS RENDERED BY THE FLORIDA SUPREME COURT

The Petitioner relies heavily on the case of *Lee vs. Bradley Fertilizer Company*, 33 So. 456 (Fla. 1903), a Florida Supreme Court case concerning dissolution of a partnership. In that case, the partnership dissolved, and certain partnership property became vested in title in the names of the individual partners, who then claimed them exempt under state exemption laws. The property in question was transferred on January 5, 1887. The creditor's bill attacking the transfer was filed on October 23, 1889, more than two and one-half years later. The Court found that the partners acted in good faith, and that the creditors had not obtained a lien by judgment or otherwise. This case also turned on the particular circumstances of dissolution of partnerships.

Petitioner also relies on the case of *Spach vs. Kleb*, 112 So.2d 21 (Fla. 3rd DCA 1959), a Florida Appellate Court decision that follows *Lee vs. Bradley*. This case also concerned the right of co-partners to severe their partnership relationship prior to the acquisition of liens by creditors, where the actions are taken in good faith. The Court denied the creditor's request for relief, stating that it was unaware of any law that gave a creditor an equitable lien upon the assets of a partnership.

Petitioner has cited cases concerning the right of a citizen of the State of Florida to own exempt property. While this is true as a general concept, it does not condone the situation where extrinsic fraud is present, and

where a debtor purchases exempt assets with the intent to hinder, delay and defraud his creditors. Exempt assets under applicable State law are also subject to being set aside if they were obtained by fraud or reprehensible conduct. *Clutter Construction Corporation vs. Clutter*, 173 So.2d 761 (Fla. 3rd DCA 1965). Therefore, Florida law does not stand for the proposition that citizens may retain all exempt assets, no matter how obtained, free and clear of the claims of all creditors. Debtors are always subject to the equally applicable rule of law that, where extrinsic fraud exists, a transfer into an exempt asset can be set aside.

Each case must rise or fall by the weight of the merits of that case. The facts and not necessarily the abstract statement of law, must rule the results of a proceeding to set aside a fraudulent transfer. *In re: Collins*, 19 B.R. 874 (M.D. Fla. 1982).

Under Florida law, when the legal effect of a conveyance is to delay, hinder or defraud creditors, it is fraud in law no matter what the actual intention may have been. *In re: Flanzbaum*, 10 B.R. 420 (S.D. Fla. 1981). It is appropriate to inquire into the circumstances surrounding a transfer, to examine whether a debtor has converted non-exempt property into exempt property with the specific intent to defraud his or her creditors. *In re: Schwarb*, 150 B.R. 470 (M.D. Fla. 1992); *In re: Strehlow*, 84 B.R. 241 (S.D. Fla. 1988); *In re: Marks*, 131 B.R. 220 (S.D. Fla. 1991), aff'd 976 F.2d 743 (11th Cir. 1992).

III. THERE IS NO CHAOS IN PRESENT BANKRUPTCY PRACTICE, AS SUFFICIENT GUIDELINES EXIST UNDER PRESENT LAW

Debtors are entitled to a fresh start, under existing law, but are not entitled to a head start. A list of prohibitions is contained in 11 U.S.C. § 727, as to what activities will prevent a debtor from obtaining a discharge. Included in that list are transfers made with the intent to hinder, delay or defraud creditors, within one year of filing a petition in bankruptcy.

In cases involving a debtor who has submitted himself to the jurisdiction of the Bankruptcy Court, the Bankruptcy Court sits as trier of fact. In determining issues of fraud, each case is weighed on its merits, and the trier fact must determine if fraud exists. Issues in law are not always black and white. Decisions made by a trier of fact can only be set aside if clearly erroneous.

The Petitioner's explanation that he relied on the advice of counsel concerning his right to own an annuity is no defense. A debtor who knows that the purpose of a transfer is to hinder or delay creditors does not rely in good faith upon the advice of counsel in negating an element of intent. *In re: Rice*, 109 B.R. 405 (E.D. Cal. 1989). The Petitioner admitted that he was warned of a possible challenge to discharge. It is also relevant that the Petitioner sustained a substantial interest penalty on the certificate of deposit by cashing it in early. In the case of *In re: Wallace*, 30 B.R. 5 (C.D. Ill. 1983), a debtor who cashed a certificate of deposit early at a substantial penalty and used the proceeds to purchase exempt assets, could not claim those assets as exempt. The Court in that case

found that there was extrinsic evidence of intent to defraud creditors.

Several courts have examined the legislative history, and have considered the argument raised by the Petitioner that the legislative history of 11 U.S.C. § 522 allows unfettered transfers of non-exempt assets into exempt assets prior to bankruptcy. In the case of *In re: Schwarb*, 150 B.R. 470 (M.D. Fla. 1992), the Court considered a situation where the debtors had sold non-exempt real property and mutual funds, and used the monies to buy exempt annuities, and pay off the mortgage on the exempt homestead, thirty (30) days before the filing of a bankruptcy proceeding. The debtors in that case raised the same basic defense the Petitioner is attempting to raise in this case. The Court thoroughly examined the Legislative History of § 522; S.Rep 95-989 and H.Rep 95-595. In addition to the Senate and House Reports, the Court reviewed the record of the hearings before the legislative committees. See, *Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 94th Cong., 2nd Sess. (1976).*

A full review of the hearing before the committee does not support a view of the legislative history as allowing uncontrolled pre-bankruptcy planning. In fact, a letter from Bankruptcy Judge Phelps, considered at the hearings, condemned the deliberate enlargement of exemptions out of the usual and customary manner of living in the contemplation of bankruptcy as a form of cheating which shocks one's conscience and brings the whole bankruptcy process into disrepute.

It is clear that a review of the complete legislative history of the Bankruptcy Code indicates that conversion of non-exempt property into exempt property should be permitted only within limits. Outright fraudulent bankruptcy planning that exceeds those limits should not be permitted. This view of the legislative history is also in accord with the language of the Bankruptcy Code, and with the general principals of equity. *In re: Schwarb, supra; In re: Spoor-Weston, Inc,* 139 B.R. 1009 (N.D.Okl. 1992).

IV. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER COURT OF APPEALS, AND IS NOT UNDULY HARSH

The Circuit Courts of Appeals are consistent in holding that a debtor who converts non-exempt assets to exempt assets immediately before bankruptcy, with the intent to defraud creditors, must be denied a discharge in bankruptcy. *In re: Reed,* 700 F.2d 986 (5th Cir. 1983); *In re: Ford,* 773 F.2d 52 (4th Cir. 1985). The two Eighth Circuit cases cited by Petitioner are consistent in ruling that, absent extrinsic evidence of fraud, the mere conversion of non-exempt property to exempt property is not fraudulent as to creditors. *Norwest Bank Nebraska, N.A. v. Tveten,* 848 F.2d 871 (8th Cir. 1988); *Hanson v. First National Bank In Brookings,* 848 F.2d 866 (8th Cir. 1988). The difference between the decisions lies in the findings of fact by the respective Bankruptcy Courts. It is clear that factual findings by Bankruptcy Judges are to be accepted by the Court of Appeals unless clearly erroneous. *In re: Reed, supra.*

In the record before the Court, there was ample evidence of extrinsic fraud. In April 1989, the Petitioner was questioned under oath at a State Court proceeding in his divorce case as to the availability of funds in a certificate of deposit, which were subject to a "lien". On or about May 25, 1989, the Petitioner became aware that an order had been entered, directing him to pay all back lump sum alimony, or be faced with contempt. The hearing on contempt was scheduled for June 13, 1989 at 3:00 p.m. Petitioner's state court counsel urged him to hire bankruptcy counsel shortly after learning of the May 25, 1989 order.

Sometime between May 25, 1989 and June 9, 1989, the Petitioner contacted Ambassador to get the lien released against the certificate of deposit. Without any hesitation or delay, Ambassador granted this request, making available a cashier's check on the morning of June 13, 1989 in the approximate sum of $50,000.00. Petitioner then met the insurance agent at the office of his bankruptcy attorney, filled out the annuity application, endorsed the cashier's check, and filed bankruptcy at 2:27 p.m. that afternoon. Although the Respondent/Trustee maintains that the transfer was actually post petitioner, the alternative theory is that the transfer took place just before the bankruptcy proceeding, and that it was a fraudulent transfer pursuant to 11 U.S.C. § 548 and 11 U.S.C. § 727(a)(2). Under either scenario, Petitioner's discharge should be denied for making a fraudulent transfer within one year of the date of the filing of his bankruptcy.

The last point raised by Petitioner is that the result below is unduly harsh, and is the product of an erroneous decision by the Court of Appeals. The lower court's findings of extrinsic fraud are well supported by the record.

The Petitioner also questions the decision by the lower court that the purchase of the annuity was actually accomplished post petition, as well as the ruling that the monies taken by the Petitioner on the contingent purchase price payments were assets of the estate. Petitioner raises no conflict issues or other matters that would warrant this Court's review of these issues. These findings are also well supported by the record.

For all of these reasons, certiorari should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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